91-428

NO. A-94

IN THE
SUPREME COURT
OF THE UNITED STATES

October Term 1991

PHILIP W. BARNES, COMMISSIONER OF TEXAS STATE BOARD OF INSURANCE, *et al.*
Petitioners,

v.

E-SYSTEMS, INC. GROUP HOSPITAL MEDICAL & SURGICAL INSURANCE PLAN, *et al.*
Respondents

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE FIFTH CIRCUIT

DAN MORALES
Attorney General of Texas

WILL PRYOR
First Assistant Attorney General

MARY F. KELLER
Deputy Attorney General

HARRIET D. BURKE
Assistant Attorney General

DAVID D. MENCHACA
Assistant Attorney General

Of Counsel

*WILLIAM E. STORIE
Assistant Attorney General
Office of the Attorney General
P. O. Box 12548
Austin, TX 78711-2548
(512) 463-2002

**Counsel of Record*

QUESTIONS PRESENTED

(1) Does the Employee Retirement Income Security Act (ERISA) abrogate a State's Eleventh Amendment immunity from suit in federal court?

(2) Does ERISA preempt a State's general tax remedies, thereby requiring suit in federal district court by ERISA Plaintiffs and making the Tax Injunction Act "inapplicable"?

(3) If the federal courts have jurisdiction over these cases, does any part of the Texas Administrative Services Tax Act (ASTA) constitute a valid exercise of the State's authority to regulate and tax the business of insurance?

(4) If the State must refund ASTA taxes from the State Treasury in an ERISA action in federal court, what is the proper measure of prejudgment interest?

LIST OF PARTIES

Petitioners, Defendants/Appellants below, are officers of the State of Texas, namely: Philip W. Barnes, successor to A. W. Pogue, Commissioner of the Texas State Board of Insurance; Richard F. Reynolds, member of the Texas State Board of Insurance; Claire Korioth, successor to Paul Wrotenbery, member and Chairman of the Texas State Board of Insurance; Allene Evans, member of the State Board of Insurance; Kay Bailey Hutchison, successor to Ann Richards, State Treasurer of Texas; and Dan Morales, successor to Jim Mattox, Attorney General of Texas[1].

Respondents, Plaintiffs/Appellees below, are various ERISA plans, trustees, administrators and sponsors, namely: E-Systems, Inc. Group Hospital, Medical and Surgical Insurance Plan, E-Systems, Inc. Group Hospital Medical, Surgical, Major Medical, Prescription Drug and Weekly Income Disability Benefit Plans, E-Systems, Inc. Group Hospital Medical, Surgical, Major Medical and Weekly Income Disability Benefit Plan, E-Systems, Inc. Health Care and Weekly Income Disability Plans, E-Systems, Inc. Dental Expense Coverage Plan, E-Systems, Inc. Employee Benefit Trust, NCNB

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[1] Petitioners will be referred to as "the State".

Texas National Bank Dallas, National Association, Trustee; US Sprint Group Health Insurance Plan, US Sprint Communications Company, a New York General Partnership, as Plan Administrator; Kimberly-Clark Corporation Medical Plan, Kimberly-Clark Corporation Dental Plan, Kimberly-Clark Health Benefits Trust, The First National Bank of Neenah, Trustee; Spenco Group Medical Plan, Spenco Medical Corporation, a Texas Corporation, as Plan Administrator; Group Life and Health Insurance Plan for Hourly Employees represented by the American Federation of Grain Millers, the Employee Group Insurance Plan for Pillsbury General Hourly Employees, Steak & Ale Group Benefit Plan for Restaurant Hourly Employees, the Group Insurance Plan for Pillsbury Salaried Employees, the Group Insurance Plan for Burger King Hourly Employees, the Group Insurance Plan for Burger King Salaried Employees, the Pillsbury Group Employees Health Benefit Trust; First Bank, National Association, Trustee, the Greyhound Lines, Inc. Salaried Employees Medical, Dental Benefits Plan ASO-19861-7, Greyhound Lines, Inc. - Amalgamated Council Health and Welfare Plan, Greyhound Lines, Inc. - Amalgamated Council Health and Welfare Trust; Kevin Bolton, Jerry Hatalla, et al., Trustees; Eagle Manufacturing, Inc. Salaried Employees Medical, Dental Benefits Plan ASO-19861-7, Kevin M. Bolton, as Plan Administrator; Shell Hospital

Surgical Medical Program, Shell Hospital Surgical Medical Program Trust, Texas Commerce Bank, National Association, Trustee, Shell Dental Assistance Plan, Shell Dental Assistance Plan Trust, Texas Commerce Bank, National Association, Trustee, Shell Flexible Spending Account Plan, Shell Oil Corporation, a Delaware corporation, as plan administrator; Texas Carpenters Health Benefit Fund, Texas Carpenters Health Benefit Trust, Harold E. Moore, J. P. Long, Jr., et al.; Trustees, La Quinta Motor Inns, Inc., as employer and sponsor of the La Quinta Employee Health Plan[2].

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[2]Respondents will be referred to collectively as "Respondents".

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E-SYSTEMS, INC., GROUP HOSPITAL, MEDICAL AND SURGICAL INSURANCE PLAN, *et al.*,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioners Philip W. Barnes, Commissioner of Insurance of the State of Texas, Richard F. Reynolds, Member of the State Board of Insurance of Texas, Claire Korioth, Chairman of the State Board of Insurance of Texas, Allene Evans, Member of the State Board of Insurance of Texas, Kay Bailey Hutchison, Treasurer of Texas and Dan Morales, Attorney General of Texas (the State) respectfully pray that the Court grant a writ of

certiorari to review the judgments and opinions of the United States Court of Appeals for the Fifth Circuit entered in the above entitled proceeding on May 1, 1991, and May 14, 1991.

OPINIONS BELOW

The opinion of the Court of Appeals, affirming the district court's summary judgment granting an injunction and ordering a refund of taxes, is published at 929 F.2d 1100 and is reprinted in the appendix, ***infra***, p. 1a. A separate, unpublished opinion was rendered on the issue of prejudgment interest and is reprinted in the appendix, ***infra***, p. 14a. The cases are now consolidated for appeal.

The Court of Appeals' order denying the State's motions for rehearing is reprinted in the appendix, ***infra***, p. 73a. Upon application by the State a stay of the judgments below was granted by the Honorable Antonin Scalia on August 2, 1991. Justice Scalia's order and opinion are reprinted in the appendix, ***infra***, p. 17a and 19a.

The district court's orders and injunctions against the State in the present cases were expressly based on its prior judgment and orders in ***Birdsong v. Olson***, 708 F.Supp. 792 (W.D. Tex. 1989), ***appeal dismissed, sub nom., Birdsong v. Wrotenbery***, 901 F.2d 1270 (5th Cir. 1990).

The district court's orders in the present cases are reprinted in the appendix, (denying motions to dismiss) *infra*, p. 26a and 27a, (granting summary judgments) *infra*, p. 48a and 55a (and awarding interest) *infra*, p. 63a and 70a. The district court's order of November 17, 1988, denying Defendants' motions to dismiss in *Birdsong* is reprinted in the appendix, *infra*, p. 29a.

STATEMENT OF JURISDICTION

This Court has jurisdiction to review the judgments of the Court of Appeals under 28 U.S.C. §1254(1) (Supp. 1991). Respondents invoked jurisdiction of the district court pursuant to 28 U.S.C. §§1331 and 1337 (Supp. 1991), and 29 U.S.C. §1132(a)(3), (d)(1) and (e) (1985). The judgments and opinions of the Court of Appeals which are sought to be reviewed were entered on May 1, 1991 and May 14, 1991. After consolidation of the summary judgments with the interest orders, the State's petition for rehearing and suggestion for rehearing en banc were denied on June 10, 1991.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. amend XI

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another State, or by Citizens or Subjects of any Foreign State.

Tax Injunction Act, 28 U.S.C. §1341 (1976).

The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State.

TEX. TAX CODE ANN. §112.051 (Vernon 1982)[1]
Act of June 10, 1981, 67th Leg., Ch. 389
1981 Tex. Gen. Laws 1490, 1514 (amended subsequently)

§112.051. Protest Payment Required

(a) If a person who is required to pay to any department of the state government an

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[1]For taxes under the Texas Insurance Code, the State's tax protest provisions were transferred in 1989 to the TEX. GOV. CODE ANN. §§ 403.201-403.211 (Vernon 1990).

occupation, gross receipts, franchise, license, or other privilege tax or fee contends that the tax or fee is unlawful or that the department may not legally demand or collect the tax or fee, the person shall pay the amount claimed by the state, and if the person intends to bring suit under this subchapter, the person must submit with the payment a protest.

TEX. TAX CODE ANN. § 112.052(a) (Vernon 1982).

§ 112.052. Taxpayer Suit After Payment Under Protest

(a) A person may bring suit against the state to recover an occupation, gross receipts, franchise, license, or privilege tax or fee required to be paid to the state, if the person has first paid the tax under protest as required by Section 112.051 of this code.

TEX. TAX CODE ANN. §112.060(a) (Vernon 1982). Act of June 10, 1981, 67th Leg., Ch. 389, 1981 Tex. Gen. Laws 1490, 1514, (amended subsequently).

§112.060. Refund

(a) If a suit under this subchapter results in a final determination that all or part of the money paid under protest was unlawfully demanded by the public official and belongs to

the taxpayer, the treasurer shall refund the proper amount, with pro rata interest earned on that amount, by the issuance of a refund warrant.[2]

TEX. TAX CODE ANN. § 112.101(a) (Vernon 1982)[3] Act of June 10, 1981, 67th Leg., Ch. 389, 1981 Tex. Gen. Laws 1490, 1514, (amended subsequently).

§ 112.101. Requirements Before Injunction

(a) No restraining order or injunction that prohibits the collection of a state tax; license, registration, or filing fee; or statutory penalty assessed for the failure to pay the state tax or fee may be granted in this state or may be granted against a state official or a representative of an official in this state unless the applicant for the order or injunction has first:

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[2]For taxes under the Texas Insurance Code, this provision was amended in 1989 to provide a tax credit or a refund at the beginning of the State's fiscal biennium for amounts recovered under a final judgment in a protest suit. TEX. GOV. CODE ANN. §403.211 (Vernon 1990).

[3]For taxes under the Texas Insurance Code, the State's tax injunction provisions were amended and transferred in 1989 to the TEX. GOV. CODE ANN. §§403.212-403.221 (Vernon 1990).

(1) paid into the suspense account of the treasurer all taxes, fees, and penalties then due by the applicant to the state; or
(2) filed with the treasurer a good and sufficient bond to guarantee the payment of the taxes, fees, and penalties in an amount equal to twice the amount of the taxes, fees, and penalties then due and that may reasonably be expected to become due during the period the order or injunction is in effect.

Employee Retirement Income Security Act
29 U.S.C. §1132(a)(3) (1985).

A civil action may be brought--

(3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan;

Employee Retirement Income Security Act §502(e)(1), 29 U.S.C. §1132(e)(1) (1985).

(1) Except for actions under subsection (a)(1)(B) of this section, the district courts of the United States shall have exclusive jurisdiction of civil actions under this subchapter brought by the Secretary or by a participant, beneficiary, or fiduciary. State courts of competent jurisdiction and district courts of the United States shall have concurrent jurisdiction of actions under subsection (a)(1)(B) of this section.

Employee Retirement Income Security Act §514(a), 29 U.S.C. §1144(a) (1985).

Except as provided in subsection (b) of this section, the provisions of this subchapter and subchapter III of this chapter shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title and not exempt under section 1003(b) of this title. This section shall take effect on January 1, 1975.

Employee Retirement Income Security Act §514(b)(2), 29 U.S.C. §1144(b)(2) (1985).

(A) Except as provided in subparagraph (B), nothing in this subchapter shall be construed to exempt or relieve any person from any law of

any State which regulates insurance, banking or securities.

(B) Neither an employee benefit plan described in section 1003(a) of this title, which is not exempt under section 1003(b) of this title (other than a plan established primarily for the purpose of providing death benefits), nor any trust established under such a plan, shall be deemed to be an insurance company or other insurer, bank, trust company, or investment company or to be engaged in the business of insurance or banking for purposes of any law of any State purporting to regulate insurance companies, insurance contracts, banks, trust companies, or investment companies.

Employee Retirement Income Security Act §514(d), 29 U.S.C. §1144(d) (1985).

Nothing in this subchapter shall be construed to alter, amend, modify, invalidate, impair, or supersede any law of the United States (except as provided in sections 1031 and 1137(b) of this title) or any rule or regulation issued under any such law.

McCarran-Ferguson Act 15 U.S.C. § 1012(a) (1976).

(a) The business of insurance, and every person engaged therein, shall be subject to the

laws of the several States which relate to the regulation or taxation of such business.

Administrative Services Tax Act
TEX. INS. CODE ANN. art. 4.11A
Sec. 4 (d) (Vernon Supp. 1991).

(d) Notwithstanding any other provision of this article, the tax imposed under this article creates no duty and shall not be collected to the extent preempted or prohibited under the constitution of this state or the United States. It is the intent of the legislature that this article not apply to any person, risk, or transaction to which it may not lawfully apply under the constitution of this state or the United States.

STATEMENT OF THE CASE

The Administrative Services Tax Act, TEX. INS. CODE ANN. Art. 4.11A, (ASTA) was passed in 1987, and required the first payment of the tax to be made on or before March 1, 1988. ASTA levies a tax on any fees received for administrative services performed by licensed insurance companies and others under an administrative services contract on behalf of health benefit plans. ASTA §§[1], 2. Respondents, except La Quinta Motor Inns, Inc. (La Quinta),

initially attacked ASTA by filing a tax protest suit in state court contending that ASTA was preempted by the Employee Retirement Income Security Act, 29 U.S.C. §§1001, *et seq.* (1985) (ERISA). These Respondents' plans and trusts paid the tax even though they were not advised or required to do so by the State. These Respondents later claimed that the State would be unable to refund the taxes if they won their protest suit, so they sought and obtained an injunction from the state district court to prohibit enforcement of ASTA on the grounds that it was preempted by ERISA.[4]

These Respondents subsequently filed a suit in federal district court and obtained an injunction and monetary relief relying among other things upon the injunction already granted in the state district court. The federal district court, following its rationale in ***Birdsong***, denied the State's motions to dismiss and granted the injunction in a summary judgment. La Quinta, having paid to the State some ASTA tax without protest and without filing any state tax suit, also obtained an injunction based on ***Birdsong***.

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[4]This state suit is pending on appeal, having been stayed by the State Court of Appeals as a result of the parallel federal litigation. The State contends in that appeal that Respondents failed to follow the statutory requirements for a tax injunction and that they have an adequate remedy at law under the protest statutes.

The district court awarded prejudgment interest to the Respondents corresponding to the rate of income which would have been received from plan investments rather than the "pro rata" interest paid to prevailing tax litigants under the state protest statutes or the rate in 28 U.S.C. § 1961 (Supp. 1991) (which Respondents requested). These interest rates ranged from 7.262% up to 11.770%, and were in fact based on rates of short term commercial borrowing, internal corporate rates of return, revolving/term working capital loans and other unspecified measures.

After consolidation of La Quinta with the other Respondents, the Court of Appeals affirmed the district court's summary judgments enjoining enforcement of the tax and ordering a refund of taxes from the State Treasury. In a separate opinion the Court of Appeals affirmed the orders on prejudgment interest. After consolidation of the summary judgments with the interest orders, the Court of Appeals denied Petitioners' petition for rehearing and suggestion for rehearing en banc.

ARGUMENT TO ALLOW THE WRIT

It is no exaggeration to say that these are cases of great constitutional importance. Fundamental principles of Our Federalism have been tossed aside without comment by the Court

of Appeals in favor of ERISA's "preemption factor".

The Court of Appeals entirely failed to address the State's Eleventh Amendment defense while ordering a refund of taxes and interest from the State Treasury. The Court of Appeals simply assumed that ERISA preempts the State's general tax remedies, depriving state courts of jurisdiction over state tax disputes and making the Tax Injunction Act "inapplicable". Either of these errors is sufficiently serious to justify a grant of certiorari by this Court. Together, they compel it.

The Court of Appeals erred in these cases by failing to recognize the simple and obvious fact that states are not like other litigants in federal court. The constitutional sovereign status of state governments cannot be circumvented or cancelled by implication and by silence. No interest in the uniformity of ERISA enforcement requires or justifies state courts to be deprived of jurisdiction over state tax matters. These cases should be dismissed for lack of jurisdiction.

THE ELEVENTH AMENDMENT

The most egregious and shocking error of the Court of Appeals is its failure even to attempt the Eleventh Amendment analysis

necessary to justify payments of damages from the State Treasury in a federal statutory action. ***See, e.g., Pennsylvania v. Union Gas Co.***, 491 U.S. 1 (1989). Even if Respondents established federal jurisdiction to obtain an injunction under the ***Young*** fiction, the constitutional limitation on retrospective relief would prevent their recovery of funds from the State Treasury. ***Ex parte Young***, 209 U.S. 123 (1908). ***Edelman v. Jordan***, 415 U.S. 651 (1974). The Eleventh Amendment, unlike the Tax Injunction Act, does not prohibit a suit against state officers for prospective injunctive relief against a tax, but it does prohibit recovery of any of the taxes paid by Respondents in these cases. ***Id.***

As recently as last term this Court was required "once again to mark the boundaries of state sovereign immunity from suit in federal court." ***Blatchford v. Native Village of Noatak and Circle Village***, 111 S.Ct. 2578 (1991). Unfortunately the Court's consistent and repeated pronouncements on the Eleventh Amendment seem to have fallen upon deaf ears in these cases.

It is not disputed that the State is the real party in interest in this litigation. ***E-Systems, Inc. Group Hospital, Medical and Surgical Insurance Plan, et al. v. Pogue***, 929 F.2d 1100 (5th Cir. 1991). ***Ford Motor Co. v. Department of Treasury***, 323 U.S. 459 (1945). "[W]hen the action is in essence one for

the recovery of money from the state, the state is the real, substantial party in interest and is entitled to invoke its sovereign immunity from suit even though individual officials are nominal defendants." *Id.*, at 464.

There are three ways under the Constitution to maintain a suit in federal district court for damages against a State. Two are easily eliminated. Respondents are not the government of another state or the federal government. The State has not consented to be sued in federal court in these actions, and no argument is made that it has. That leaves one possibility. The State may be sued by private persons in federal district court for money damages if Congress has abrogated the State's sovereign immunity.

"Congress may abrogate the State's constitutionally secured immunity from suit in federal court only by making its intention unmistakably clear in the language of the statute." ***Atascadero State Hospital v. Scanlon***, 473 U.S. 234, 242 (1985). "A general authorization for suit in federal court is not the kind of unequivocal statutory language sufficient to abrogate the Eleventh Amendment. When Congress chooses to subject the States to federal jurisdiction, it must do so specifically." *Id.*, at 246.

"Lest *Atascadero* be thought to contain any ambiguity, we reaffirm today that in this area of law, evidence of congressional intent must be both unequivocal and textual." *Dellmuth v. Muth*, 491 U.S. 223, 230 (1989). Even "frequent reference to the States" in a statute, which would "make the States ... logical defendants", creates only a "permissible inference" that Congress intended to subject the States to the federal statutory cause of action. *Id.*, at 232. "It would not be the unequivocal declaration which, we reaffirm today, is necessary before we will determine that Congress intended to exercise its power of abrogation." *Id.* Sadly, the Court of Appeals does not even purport to find statutory language sufficient to meet the test of abrogation.

Under the most generous view of the Court of Appeals' implicit opinion, the State is subject to an ERISA suit for damages in federal court because of ERISA's grant of "exclusive jurisdiction". The district court at least stated this rationale explicitly. "By vesting the exclusive jurisdiction of civil actions relating to the preemption of state tax laws in the federal district courts, Congress has abrogated the State's Eleventh Amendment immunity". Appendix, p. 45a. This is wrong.

Exclusive federal jurisdiction by itself does not abrogate a state's immunity from suit in federal court. ***Hoffman v. Connecticut Dep't of Income Maintenance***, 492 U.S. 96 (1989). ***Accord, Chew v. California***, 893 F.2d 331 (Fed. Cir.) ***cert. denied,*** 111 S.Ct. 44 (1990); ***Lane v. First National Bank*** , 871 F.2d 166 (1st Cir. 1989); ***BV Engineering v. University of California, Los Angeles,*** 858 F.2d 1394 (9th Cir. 1988), ***cert. denied***, 489 U.S. 1090 (1989); ***Richard Anderson Photography v. Brown***, 852 F.2d 114 (4th Cir. 1988), ***cert. denied*** 489 U.S. 1033 (1989). "The fact that Congress grants ***jurisdiction*** to hear a claim does not suffice to show Congress has abrogated all ***defenses*** to that claim. The issues are wholly distinct." ***Blatchford, supra,*** at 2585, n.4. (emphasis original).

Silence on the part of Congress regarding the State's amenability to a suit for damages under a federal statute is no justification for an abrogation of the State's immunity from suit even when the State is expressly made subject to the federal statute. ***Employees v. Department of Public Health & Welfare***, 411 U.S. 279 (1973). Similarly, if ERISA must be enforced by an action for damages against a state, Congress has adequately dealt with state sovereign immunity by providing that the Secretary of Labor may bring suit. Id. 29 U.S.C. §1132(a)(5) (1985).

The Court of Appeals, however, in its headlong rush to condemn ASTA, charged blindly

past the State's jurisdictional defense under the Eleventh Amendment. "Having concluded that ASTA is preempted by ERISA we need proceed no further. The State received monies from the ERISA plans to which it was not entitled. The funds must be returned." ***E-Systems***, at 1104, Appendix, p. 11a. In affirming the district court's orders on interest the Court said that "[w]hether characterized as an award of damages or as prejudgment interest ... the ERISA plans are made whole ...". Appendix, p. 16a. While such clear equitable sensibilities are appropriate in every case, they cannot override constitutional limitations. ***Edelman, supra; Ford Motor Co., supra.***

The decision to ignore the Constitution is especially troublesome in view of the fact that the State's prior appeal of the ASTA/ERISA litigation was dismissed after the Court of Appeals ***sua sponte*** raised and vigilantly enforced its jurisdictional concerns regarding Fed. R. Civ. P. 59(e). ***Birdsong v. Wrotenbery***, 901 F.2d 1270, 1271 (5th Cir. 1990)[5]. Jurisdictional issues

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[5]The State has accepted the consequences of its procedural error in the prior litigation, but should not have to accept the gross omission of an essential constitutional issue. The State has refunded approximately $9 million as a result of the prior litigation in ***Birdsong***. Approximately $40 million more may be refunded if ASTA is finally determined to be invalid in its entirety by the state courts. If this determination is made in federal court, the cost will be higher because of claims by non-protesting taxpayers, additional interest and damages, and the possible award of attorneys' fees against the State.

arising under the Constitution deserve comment at least as much as jurisdictional issues arising under the Rules of Civil Procedure.

It is thoroughly wrong and thoroughly incredible that a federal court would order a State to pay damages to private litigants in a federal suit without even addressing the Eleventh Amendment. This Court must not tolerate such a radical and insupportable departure from constitutional jurisprudence and from this Court's clear and consistent precedents.

THE TAX INJUNCTION ACT

The Court of Appeals' analysis of the Tax Injunction Act is not much better than its analysis of the Eleventh Amendment. The Tax Injunction Act, properly viewed, requires dismissal of these federal court cases in their entirety. The Tax Injunction Act drastically limits jurisdiction over suits in federal district court to enjoin state taxes if an adequate remedy may be had in state court. A state must provide a full hearing and judicial determination in which a person may raise federal objections, but need not provide a remedy as complete as that in federal court in order for its remedy to be adequate. ***Rosewell v. La Salle National Bank***, 450 U.S. 503 (1981).

The Tax Injunction Act reflects the principles of federalism which have long motivated federal courts to exercise restraint in the area of state tax administration. ***California v. Grace Brethren Church***, 457 U.S. 393 (1982); ***Dows v. City of Chicago***, 78 U.S. (11 Wall.) 108 (1870); ***Matthews v. Rodgers***, 284 U.S. 521 (1932); ***Fair Assessment in Real Estate v. McNary***, 454 U.S. 100 (1981). Its basic premise is that state tax litigation belongs in state courts, even when federal law issues may determine the outcome. ***See, e.g., Franchise Tax Board v. Alcan Aluminium, Ltd.***, 493 U.S. 331 (1990).

The Tax Injunction Act represents the judgment of Congress that even concurrent federal jurisdiction over state taxes unnecessarily impinges on the principles of federalism according to which the states conduct their sovereign affairs. The Court of Appeals, with the same regard it showed for those principles in its view of the Eleventh Amendment, simply assumed that ERISA ousted state courts of their jurisdiction over this most sensitive and essential sovereign activity, control of state revenues. The Court of Appeals apparently did not question the adequacy of the State's tax remedies, per se, but in effect held them to be useless in the face of an omnipotent ERISA.

ERISA does not "alter, amend, modify, invalidate, impair or supersede any law of the United States ... ." 29 U.S.C. §1144(d) (1985). "The applicability of the Tax Injunction Act, therefore, is apparently unaffected by ERISA." ***Ashton v. Cory***, 780 F.2d 816, 818 (9th Cir. 1986) (Kennedy, J.). The Court of Appeals in ***E-Systems***, however, concluded that the Tax Injunction Act does not apply "because of the preemption factor". ***E-Systems***, at 1102, Appendix, p. 6a. "State Courts lack jurisdiction to decide the dispositive issue in this case -- whether ERISA preempts ASTA. It necessarily follows that there can be no effective State remedy under the Tax Injunction Act which, therefore, is inapplicable in an ERISA setting." ***Id.*** The sole explanation and support relied upon by the Court of Appeals "to take the drastic step of carving out an exception to the Tax Injunction Act" (***Ashton, supra***, at 822) is "the preemption factor".

If a tax litigant has an adequate remedy in state court, the Tax Injunction Act requires that suit be brought there regardless of any federal complaints which might otherwise be available. Without articulating its premises as to why state courts would lack jurisdiction to judge the state's own tax statutes, the Court of Appeals effectively held that general state tax remedies are displaced by ERISA whenever ERISA issues are raised. The district court also asserted that

state courts lacked jurisdiction to decide the preemption issue. Appendix, p. 34a. Obviously, the statutory tax remedies do not otherwise 'relate to' ERISA. By implication, the Court of Appeals concluded that ERISA preempts the right of an ERISA party to bring a "well-pleaded complaint" under a state tax statute.

It is true that state causes of action may sometimes be displaced by federal preemption as a result of a corollary to the "well-pleaded complaint rule". ***Avco Corp. v. Machinists***, 390 U.S. 557 (1968); ***Metropolitan Life Ins. Co. v. Taylor***, 481 U.S. 58 (1987). It is not true that ERISA automatically preempts state law causes of action any time an ERISA issue is raised. ***Franchise Tax Board v. Construction Laborers' Vacation Trust***, 463 U.S. 1 (1983) (*CLVT*).[6] ***Mackey v. Lanier Collections Agency & Service, Inc.***, 486 U.S. 825 (1988). The general rule is that state causes of action will not be pre-empted. ***Taylor, supra***.

ERISA provides exclusive federal court jurisdiction "of civil actions under this subchapter." 29 U.S.C. §1132(e)(1) (1985). "In ***Franchise Tax Board***, the Court held that ERISA preemption, without more, does not convert a state claim into an action arising under federal law." ***Taylor, supra***, at 64. "As we said in ***Gulley***:

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[6]The interplay between the Tax Injunction Act and ERISA at issue in these cases was alluded to but not addressed by the *CLVT* court. ***Id.***, at 20 n.21, 27 n.31.

'By unimpeachable authority, a suit brought upon a state statute does not arise under an act of Congress or the Constitution of the United States because prohibited thereby.'" ***CLVT, supra***, at 12. Even if ERISA entirely preempted ASTA, a state tax protest or injunction suit, "by unimpeachable authority", would not arise under ERISA.

The Court of Appeals erroneously saw no distinction between ***Taylor***'s unanimous decision that ERISA-related claims of a beneficiary are exclusively federal and ***CLVT***'s unanimous holding that a state tax claim "is not of central concern to the federal statutes." ***CLVT, supra***, at 25-26. Because preemption is a matter of congressional intent, an analysis of that intent is necessary to determine whether ERISA displaces normally available state tax remedies. Quoting a Congressional conference report, the ***Taylor*** court noted that "[w]ith respect to suits to enforce benefit rights under the plan or to recover benefits under the plan ... such actions in Federal or State courts are to be regarded as arising under the laws of the United States in similar fashion to those brought under §301 ... ." ***Taylor, supra***, at 65-66.

Extensive federal pre-emption of state law is generally not favored. ***See, e. g., Wisconsin Public Intervenor v. Mortier,*** 111 S.Ct. 2476 (1991). Legislative history and statutory language supported ***Taylor***'s view that ERISA benefit

claims are intended to be exclusively federal, and the Court cited two more examples of that clear intent in the Congressional Record. *Id.*, at 66. The *Taylor* court "would be reluctant to find that extraordinary pre-emptive power, such as has been found with respect to §301 of the LMRA" without the "parallels" of the civil enforcement provisions in the statutes, "fully confirmed by the legislative history." *Id.*, at 65.

No similar language in ERISA's text or history is cited to show that tax claims against a state or state agency must be treated as exclusively federal suits. Claims against a state for a refund of taxes are not remotely like benefit claims under a plan or employment contract disputes under the Labor Management Relations Act 29 U.S.C. §151, *et seq.* (1973). While a claim for benefits from an ERISA plan may be "purely a creature of federal law", a claim for a refund of taxes from a state is not such a creature. *CLVT, supra*, at 23. Instead, Congress intended ERISA (like the LMRA) not to exclusively control important state sovereign functions, as shown by the fact that states are exempted from the substantive provisions of both the LMRA and ERISA. 29 U.S.C. §152(2) (Supp. 1991); §§1002(32) (Supp. 1991), 1003(b)(1) (1985).

Claims against a state for a refund of taxes, like claims against a state for payment of

pension benefits, are not federal ERISA claims. The unique importance of state tax administration, the absence of Eleventh Amendment abrogation, and the absence of any specific language of intent to make state tax claims exclusively federal show that Congress has not displaced general state tax remedies "in an ERISA setting". Even if it were possible to reach such a "drastic" conclusion, it would require more support than "the preemption factor."

Similarly, it makes little sense to allow the State to bring a tax collection action related to ERISA as plaintiff in state court while requiring the State to defend the same tax with the same issues only in federal court. To construe ERISA in this manner might encourage some unseemly races to the courthouse whenever ERISA touches upon an issue of state taxation. Application of the well pleaded complaint rule to ERISA issues ought to depend ultimately on the nature of the claim rather than the identity of the party bringing it.

The concurring opinion in ***E-Systems*** sought to provide a better rationale for the Court of Appeals holding and correctly recognized that the State's tax remedies are generally available to challenge state taxes on the grounds of federal preemption. The concurrence, however, makes an assumption about what the Texas appellate

courts would conclude about the preemptive effect of federal ERISA jurisdiction in a tax case. The concurrence then defers to that assumption. The concurrence also overlooks the Court's unanimous holding in ***CLVT*** that preemption by ERISA of a tax claim on the merits is quite distinct from preemption of the state cause of action by which the claim is presented.

If ERISA preempts state court jurisdiction over state tax disputes it must be because of what Congress has said in the statute, not because of a state court decision in another context. Nothing indicates that the Texas Supreme Court would treat the State defending its taxes the same as an individual ERISA beneficiary litigating her ERISA benefits. ***Gorman v. Life Ins. Co. of North America***, 34 Tex. Sup. Ct. J. 457 (March 27, 1991). The state courts certainly have not held that ERISA preempts the State's tax protest or tax injunction statutes.[7] Moreover, state court decisions do not conclusively decide questions of federal jurisdiction. The state district court which issued the first injunction against ASTA

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[7]***Gorman*** is actually a rather tardy recognition by the Texas Supreme Court of the force of ERISA on the claims of ERISA beneficiaries. ***See Ingersoll-Rand Co. v. McClendon***, 111 S.Ct. 478 (1990). It does not mean that the Texas Supreme Court would be as willing as the Court of Appeals to entirely overlook the sovereign character and interests of the State.

expressed no doubt about its subject matter jurisdiction to determine ERISA preemption, and neither does the State.

Although Respondents argued and the federal district court accepted that the State's tax remedies were uncertain, the Court of Appeals declined to rely on this alternate ground to maintain jurisdiction despite the Tax Injunction Act. The State's tax protest and other remedies are more than adequate to meet the requirements of the Tax Injunction Act. ***Alnoa G. Corp. v. Houston***, 563 F.2d 769 (5th Cir. 1977), ***cert. denied***, 435 U.S. 970 (1978); ***City of Houston v. Standard-Triumph Motor Co.***, 347 F.2d 194 (5th Cir. 1965), ***cert. denied***, 382 U.S. 974 (1966)[8].

If the Court of Appeals had adopted the district court's additional rationale, it would still be wrong. Under Texas law the "taxpayer", for purposes of maintaining a tax protest suit, is the person who paid the tax rather than the

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[8]In a recent case discussing the adequacy of state tax remedies for purposes of constitutional due process, the Court identified several types of remedies which would be adequate. ***McKesson Corp. v. Division of Alcoholic Beverages and Tobacco, Dep't of Business Regulation***, 110 S.Ct. 2238 (1990). Because the Tax Injunction Act requires that the state court remedy "meets certain minimal ***procedural*** criteria", ***McKesson*** is instructive. ***Rosewell, supra***, at 512. A State may provide a 'predeprivation process' by authorizing suit for an injunction. ***McKesson, supra***, at 2254. A state may also provide postdeprivation relief in the form of refunds of taxes paid under protest with interest. Texas provides both types of relief.

person who should have paid. ***Bernard Hanyard Enterprises v. McBeath***, 663 S.W.2d 639 (Tex. App. - Austin 1984, ***writ ref'd n.r.e.***). Respondents (except La Quinta) were pursuing their tax protest remedy in state court when they decided to argue that the State would be unable to refund the taxes if they won the protest suit.

Under their 'catch 22' theory, the payment of protested taxes into the State's general revenue fund (rather than a suspense account) and the absence of a specific appropriation for a refund of ASTA taxes meant that the State could not refund the money. However, the State's ability (and obligation) to refund taxes to prevailing tax suit plaintiffs is plain, speedy and efficient as a matter of law. The State's general tax remedies are intended, and must be construed, to give real relief to aggrieved tax litigants, not to be some kind of dirty trick to deny refunds based on an accounting technicality.

Neither Respondents nor the lower courts have cited any cases (and there are none) where the State simply failed to pay a tax suit judgment against it[9]. The protest statutes

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[9]The general appropriation statute provided that "money deposited into the State Treasury which is subject to refund as provided by law shall be refunded from the fund into which such money was deposited, and so much as is necessary for said refunds is hereby appropriated." Texas Appropriations - General Act, 70th Leg., 2nd C.S. Ch. 78, Art. V, Sec. 29 1987 Tex. Gen. Laws 253, 846.

expressly require a refund (or credit) of taxes with interest to a successful litigant. TEX. TAX CODE ANN. §§112.060, 112.107 (Vernon Supp. 1991); TEX. GOV. CODE ANN. §§403.211, 403.220 (Vernon 1990). "If ... money paid under protest was unlawfully demanded ... the treasurer shall refund the proper amount, with pro rata interest earned on that amount, ..." TEX. TAX CODE ANN. §112.060(a) (Vernon 1982). A refund of protested taxes plus interest to a successful litigant is not uncertain or speculative, but is clearly provided as a matter of law.

Furthermore, Texas, unlike many states, provides injunctive relief in tax matters, and makes such relief available to "the applicant", *i.e.*, not exclusively to "the taxpayer". TEX. TAX CODE ANN. §112.107 (Vernon Supp. 1991), TEX. GOV. CODE ANN. §403.212 (Vernon 1990). Thus, Respondents have adequate relief in state court either under the protest or the injunction statutes. The state district court, in fact, accepted Respondents' rather speculative and fanciful arguments about the adequacy of their protest remedy, allowed taxes to be deposited into the registry of state court, and enjoined the State from collecting or enforcing the ASTA tax.

Still not satisfied, Respondents sought and obtained the federal injunctions now on appeal. Plainly, there is no need to subject the State to two injunctions. The federal district court did

not point out any inadequacy of the state court's injunctive relief. The existence of an adequate state remedy for purposes of the Tax Injunction Act does not depend on whether a remedy is wisely or correctly employed by a litigant. ***Ford Motor Credit Co. v. Louisiana Tax Comm'n.***, 440 F.2d 675 (5th Cir. 1971). Similarly, the confusion fostered by persons paying taxes which they clearly do not owe cannot be used to subvert the availability of tax remedies which exist as a matter of law.

Finally, even if some Respondents were to argue that they did not pay the tax and are therefore entitled to federal injunctive relief, the Court should consider whether they are barred by the Tax Injunction Act in respect of a liability actually paid and contested by the plans and trusts under their control. ***Alcan, supra***. The plans and trusts who paid the ASTA tax under protest in state court are entirely controlled by the Respondent trustees, administrators and sponsors. This is the same complete control which existed in ***Alcan***, and the same principles should apply for purposes of the Tax Injunction Act.

ERISA, TAXATION AND PRINCIPLES OF FEDERALISM

Congress did not subject the states to ERISA for purposes of regulating state retirement and benefit plans, but did give state courts the power to hear ERISA benefit claims. 29 U.S.C. §1003(b)(1) (1985), §1132(a)(1)(B) (1985). State courts routinely deal with federal statutory and constitutional issues, including direct Commerce Clause challenges to state taxes. ***See, e.g., Complete Auto Transit, Inc. v. Brady***, 330 So.2d 268 (Miss. 1976), ***aff'd***, 430 U.S. 274 (1977). The Supremacy Clause itself gives to "the Judges in every State" the duty of maintaining federal law as "the supreme Law of the Land". U.S. CONST., art. VI, cl. 2.

In view of these and other considerations, it would be very unlikely and very odd that Congress implicitly intended ERISA to oust state courts of their jurisdiction over state taxes in order to secure ERISA's enforcement. Certainly the State recognizes the supremacy of federal law. If it is ultimately determined that ERISA preempts (or eviscerates) ASTA, so be it.

The more fundamental question for the Court in these cases is not merely whether a particular state tax may be preempted, but whether the sovereign power of a state to defend its taxes in its own courts must be destroyed in

the interest of maintaining the supremacy of federal law. Our federal system establishes a balance of powers, a balance of dignities, between the federal and state governments. ***Martin v. Hunter's Lessee***, 14 U.S. (1 Wheat.) 304 (1816). That balance is properly maintained when state courts are allowed to perform their constitutional duties to uphold the supremacy of federal law. The constitutional balance need not and should not be altered by ERISA.

"Of course, we continue to recognize that the States occupy a special and specific position in our constitutional system and that the scope of Congress' authority under the Commerce Clause must reflect that position." ***Garcia v. San Antonio Metropolitan Transit Authority***, 469 U.S. 528, 556 (1985). It is questionable that Congress, acting under the Commerce Clause, would ever legislate directly to destroy the State's power to decide the validity of a state tax in state court. U.S. CONST. art. IV, §4[10]; U.S. CONST. amend. X[11]; 28 U.S.C. §1341 (1976). Surely no such drastic intent can be presumed in ERISA, without discussion, from congressional silence. ***Employees, supra; Ashton, supra***, at 822.

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[10]The United States shall guarantee to every State in this Union a Republican Form of Government, ...

[11]The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

The right to litigate its taxes in its own courts is obviously one of the most important sovereign attributes of state government. Even the usual requirements of constitutional due process are modified in the context of state taxation. ***McKesson, supra.*** The State's "exceedingly strong interest" in its tax system must be considered in evaluating Congress' intent in ERISA. ***Id.***, at 2250. ***Garcia, supra.***

Depriving states of jurisdiction over state taxes, even more than subjecting them to federal jurisdiction, requires a careful analysis of the principles of federalism. The power of states to resist federal suit except by consent or congressional abrogation is clearly supported by the principles of federalism found in the Tenth Amendment and elsewhere in the Constitution as well as in the Eleventh Amendment. The strict requirement for congressional abrogation, while tied to the Eleventh Amendment by precedent, can be seen as a particular instance of a doctrine which ought to apply generally to federal-state relations under the Constitution. If important state sovereign functions are to be affected or controlled by federal statutes, Congress must say so explicitly.

The Tenth Amendment protections of the political process should at least require an unmistakably clear declaration of intent by

Congress before the states' sovereign power and dignity will be subordinated under a federal statute. ***South Carolina v. Baker***, 485 U.S. 505 (1988); ***Atascadero, supra***. Anything less, anything in federal statutes which by implication appears to treat the states as ordinary private persons, represents a defect in the constitutional political process. Statutory provisions which involve fundamental issues of federalism, such as jurisdiction and taxation, should not be applicable to the states by mere implication.

If this Court somehow finds that Congress in ERISA did intend to deprive state courts of their power to hear state tax cases, the Court should inquire whether such an intent is constitutionally permissible. Although the Court has apparently limited protection of the state's constitutional sovereign interests to the political system, the Court should reconsider whether this (or any other constitutional guarantee) can rely solely on the good will and judgment of congressional politics. Despite the obvious difficulties of determining what specific state activities are protected by the Constitution, a federal Commerce Clause statute which takes away the power of states to litigate their own tax statutes in state court goes too far.

ERISA AND ASTA

If the Court somehow determines that it has jurisdiction over the merits, the Court must consider whether any part of ASTA represents a valid exercise of state authority. It is undisputed that ERISA leaves open the State's power to regulate the business of insurance. 29 U.S.C. § 1144(d)(2)(A) (1985). ***Metropolitan Life Ins. Co. v. Massachusetts***, 471 U.S. 724 (1985). It is, therefore, logical and proper that the State of Texas would seek to regulate and tax the insurance business up to, but not over, the boundary created by ERISA. Petitioners concede, as they voluntarily conceded at oral argument in the Court of Appeals, that ASTA relates to ERISA. That fact is only the beginning of the analysis.

The Texas legislature expressly intended not to apply ASTA where it would be preempted. ASTA §4(d). The Texas legislature should be taken at its word rather than be accused by implication of pursuing an improper objective. ***E-Systems,*** at 1102, Appendix, p. 4a. The ASTA tax does not apply to plans and trusts and has never been assessed against them. If ERISA is such an incredible tarbaby that states can not even legislate around it, perhaps the whole of ASTA will fall. The better choice is to determine what provisions of ASTA survive as a matter of statutory construction.

In ERISA Congress did not "alter, amend, modify, invalidate, impair or supersede" the McCarran-Ferguson Act, 15 U.S.C. §1011, *et seq.* (1976), 29 U.S.C. §1144(d) (1985). "Congress declares the continued regulation and taxation by the several states of the business of insurance is in the public interest, and that silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several states." 15 U.S.C. § 1011 (1976). "The business of insurance, and every person engaged therein, shall be subject to the laws of the several states which relate to the regulation or taxation of such business." 15 U.S.C. § 1012(a) (1976) (emphasis added). The "relate to" language of McCarran-Ferguson is no less broad than the "relate to" language of ERISA.

Multiple employer welfare arrangements (MEWAS) and plans providing death benefits are subject to state insurance regulation even though they are specifically recognized as ERISA entities. 29 U.S.C. §§1144(b)(2)(B), (6)(A) (1985). Furthermore, third party or "contract" administrators, who are often licensed insurance companies providing stop-loss coverage, frequently perform the claims adjustment services and claims processing services associated with the payment of ERISA benefits. These entities are subject to the state's general powers of insurance regulation,

which are preserved in ERISA. Third party administrators, whose activities are subjected to tax by ASTA, are not even mentioned in ERISA.[12] An overbroad interpretation of ERISA preemption will create a regulatory void contrary to the interests of ERISA itself and of the people of Texas and other states.

Congress easily could have made ERISA an exception to McCarran-Ferguson or omitted the insurance saving clause, but it did not. The "deemer" clause only provides that plans and trusts shall not be deemed to be insurance companies, thus leaving open the question of whether third party administrators can be considered part of the insurance business for purposes of state regulation. Congress certainly has not said that even licensed insurance companies can not be deemed to be in the business of insurance when they perform administrative claims and adjustment services. Furthermore, the "business of insurance", for purposes of the State's regulatory and tax authority, is broader than the range of anticompetitive practices exempted from the

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[12]The State has also established regulations for third party administrators under the Texas Insurance Code, Art. 21.07-6. The regulations set standards for persons who adjust or settle claims in connection with life, health and accident benefits. *Id.* §1. The regulations do not apply to employers acting for their employees or affiliates, unions acting for their members, tax exempt trusts and various others. *Id.* §1(A), (B), (H).

federal antitrust laws in 15 U.S.C. §1012(b) (1976).

Admittedly, ERISA is all powerful within its sphere. However, despite the concerns of many and the hopes of some, ERISA's proper influence should not be felt at the limits of the known universe.[13] ERISA effectively establishes a system of private insurance offered through the plans.[14] Congress has made this private insurance under a plan an exclusive federal ERISA domain, but Congress expressly saved the states' authority under McCarran-Ferguson and their own police powers to regulate and tax the business of insurance even where that business involves ERISA plans. ***Metropolitan Life Ins. Co., supra; General Motors Corp. v. California State Board of Equalization***, 815 F.2d 1305 (9th Cir. 1987), ***cert.***

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[13] "Unfortunately, there is little that I or any other member of this court can do about this deplorable demise of state-given rights other than to lament their passage." ***Cathey v. Metropolitan Life Ins. Co.***, 805 S.W.2d 387, (Tex.) (Doggett, J., concurring), ***cert. denied***, 111 S.Ct. 2855 (1991). "ERISA has become more than mere quicksand; it has become a black hole." ***Id.***

[14] Although often described as "self-insurance", that term is, in fact, an oxymoron. The essential characteristic of "insurance" is a contractual relationship involving the spreading of risk. A person may save for a rainy day, but cannot spread his risk of loss to himself any more than he can contract with himself. ERISA allows sponsors to create plans, like the Respondents' plans, providing benefits and spreading the risk to a limited class of persons (employees and dependents) rather than to the public generally.

denied, sub nom., General Motors Corp. v. Bennett, 485 U.S. 941 (1988).

Congress has entirely preempted the field regarding actions for benefits and other actions within the ERISA universe, but that does not mean that an outside entity doing business with an ERISA entity is not subject to state regulation and taxation. Non-fiduciary insurance companies and third party administrators perform functions for the general public even where they are compensated by private ERISA plans. Neither the plain language nor the intent of Congress should be construed to exempt from state regulation and taxation persons doing an insurance type business not within, but within the shadow of, ERISA.

INTEREST

If the Court somehow determines that the State must pay damages from the State Treasury to Respondents in these cases, the Court must still consider the proper measure of prejudgment interest. The district court awarded interest at various rates ranging from 7.262% to 11.770% based on the rate equivalent to income from investments of the various plans.

This Court has previously considered the question of pre-judgment interest where a taxpayer is entitled to a refund of taxes based on

the assertion of a federal right. ***Board of Commissioners v. United States***, 308 U.S. 343 (1939). "Beneficiaries of federal rights are not to have a privileged position over other aggrieved taxpayers in their relation with the States or their political subdivisions." ***Id.*** at 352. Accord, ***West Virginia v. United States***, 479 U.S. 305 (1987).

The rate of interest on taxes paid under protest in Texas is denominated "pro rata" interest and is calculated using the total amount of interest earned by the State on its deposits and then determining a taxpayer's share based on the amount of its protest payment. TEX. TAX CODE ANN. §§112.060 and 112.107 (Vernon Supp. 1991), TEX. GOV. CODE ANN. §§403.211, 403.220 (Vernon 1990). Other courts have relied on state law in non-tax cases to determine the proper rate of pre-judgment interest under ERISA. ***Dependahl v. Falstaff Brewing Corp.***, 653 F.2d 1208 (8th Cir. 1981), ***cert. denied***, 454 U.S. 968 and 454 U.S. 1084 (1981). Awarding a higher rate based on the plans' investment returns plainly contravenes the holding of the Court in ***Board of Commissioners, supra.***

Pre-judgment interest is granted in response to considerations of fairness. ***Blau v. Lehman***, 368 U.S. 403, 414 (1962). ERISA does not expressly provide for an award of pre-judgment interest. Absent a statutory mandate, the award of pre-judgment interest is generally

discretionary with the trial court. ***Whitfield v. Lindemann***, 853 F.2d 1298 (5th Cir. 1988), ***cert. denied, sub nom., Klepak v. Dole***, 490 U.S. 1089 (1989). Congress' primary concern in ERISA is for the financial welfare of the plans. ***Massachusetts Mutual Life Ins. Co. v. Russell***, 473 U.S. 134 (1985).

Where the plans and trusts are funded on an "as-needed" basis, it is improper to substitute borrowing rates or intercorporate rates of return for actual investment income. If actual plan assets have not been spent, there is no justification or need to use a special measure of interest based on income from those assets. Respondents only requested the usual federal rate provided by 28 U.S.C. §1961 (Supp. 1991). While more reasonable, this measure also contravenes the Court's holding in ***Board of Commissioners*** that all taxpayers should be treated equally.

ASTA by its own terms does not apply where preempted or prohibited by federal law or the Constitution. ASTA §§4 (a), (c), (d). Some Respondents, while claiming preemption, paid the tax out of plan assets and not pursuant to any demand, assessment or collection action by the State. Therefore, any damages for loss of use of the funds by those Respondents were incurred voluntarily. It is hard to see how plans and fiduciaries have performed in accordance

with their duties under ERISA by paying a tax which was never demanded of them and which expressly stated that it did not apply where preempted. 29 U.S.C. §1103(c) (Supp. 1991). ASTA §4(d). Considerations of fairness should not require the State to pay for additional damages which were self-inflicted.

CONCLUSION

For the reasons stated, this petition for writ of certiorari should be granted.

Respectfully submitted,

DAN MORALES
Attorney General of Texas

WILL PRYOR
First Assistant Attorney General

MARY F. KELLER
Deputy Attorney General

HARRIET D. BURKE
Assistant Attorney General
Chief, Taxation Division

DAVID D. MENCHACA
Assistant Attorney General

*WILLIAM E. STORIE
Assistant Attorney General
Taxation Division
P. O. Box 12548
Austin, Texas 78711-2548
(512) 463-2002
(512) 478-4013 Telecopier
**Counsel of Record*

91-428

NO. A-94

IN THE
SUPREME COURT
OF THE UNITED STATES

October Term 1991

PHILIP W. BARNES, COMMISSIONER OF
TEXAS STATE BOARD OF INSURANCE, *et al.*
Petitioners,

v.

E-SYSTEMS, INC. GROUP HOSPITAL
MEDICAL & SURGICAL INSURANCE PLAN, *et al.*
Respondents

APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE FIFTH CIRCUIT

DAN MORALES
Attorney General of Texas

WILL PRYOR
First Assistant Attorney General

MARY F. KELLER
Deputy Attorney General

HARRIET D. BURKE
Assistant Attorney General

DAVID D. MENCHACA
Assistant Attorney General

Of Counsel

*WILLIAM E. STORIE
Assistant Attorney General
Office of the Attorney General
P. O. Box 12548
Austin, TX 78711-2548
(512) 463-2002

**Counsel of Record*

INDEX TO APPENDIX

E-SYSTEMS, INC. Group Hospital Medical & Surgical Insurance Plan, et. al., Plaintiffs-Appellees,

v.

A. W. POGUE, Commissioner of the Texas State Board of Insurance, Defendant-Appellant.

LA QUINTA MOTOR INNS, INC., Plaintiff-Appellee,

v.

Richard F. REYNOLDS, as a Member of the Texas State Board of Insurance, et al., Defendants-Appellants.

Nos. 89-1707, 89-1709.

United States Court of Appeals,
Fifth Circuit.

May 1, 1991.

Appeals from the United States District Court for the Western District of Texas.

Before BROWN, POLITZ, and JOHNSON,

Circuit Judges.

POLITZ, Circuit Judge:

In these consolidated cases the district court found that the Employee Retirement Income Security Act (ERISA), 29 U.S.C. §§ 1001-1461, preempts the Texas Administrative Services Tax Act (ASTA), Tex. Ins. Code art. 4.11A, as it relates to ERISA plans, enjoined the collection of the tax, and directed a return of the monies wrongfully received therefrom. The State appeals, contending that the federal court lacked jurisdiction by virtue of the Tax Injunction Act, 28 U.S.C. §1341, and the eleventh amendment and, even assuming the court had jurisdiction, the State contends that the tax at issue is not preempted by ERISA. Finding no merit in appellant's assignments of error, we affirm the judgment of the district court in each of the cases.

Background

In 1987 Texas enacted ASTA imposing a 2.5% annual tax on each person "receiving any form of administrative or service fee, consideration, payment, premium, fund, reimbursement, or compensation" for providing a service for

> any employer-employee, multiple employer-employee, self-insurance group, member, or other medical, accident, sickness, injury,

> indemnity, death, or health benefit plan, including but not limited to any medical, surgical, orthopedic, chiropractic, physical therapy, speech pathology, audiology, mental health, dental, hospital, workers' compensation, optometric, or health maintenance organization plan or program, but excluding any portion of such plan for which premiums for insurance are received by the carrier and are otherwise subject to taxation by this state ....

Tex. Ins. Code art. 4.11A § 1. These plans are virtually identical to those covered by ERISA, 29 U.S.C. § 1002(1), which prescribes:

> The terms 'employee welfare benefit plan' and 'welfare plan' mean any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that such plan, fund, or program was established or is maintained for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise, (A) medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment, or vacation benefits, apprenticeship or other training programs, or day care centers, scholarship funds, or prepaid legal services, or (B) any benefit described in section 302(c) or the

> Labor Management Relations Act, 1947 (other than pensions on retirement or death, and insurance to provide such pensions).

For purposes of describing the scope of its tax, ASTA defines administrative or service fees to include

> the total gross amount of all consideration, fees, payments, reimbursements and all compensation received by the carrier or other person during the taxable year for each and every kind of such service, activity, or function described ... and
>
> the total amount of all claims and benefits paid to or on behalf of employers, multiple employers, employees, unions, beneficiaries, trust members, spouses, dependents or other persons under a plan ....

ASTA, art. 4.11A § 3(2)(A) & (B). Thus, although ASTA purportedly taxes only "administrative" or "service" fees, these by definition include both the administrative fees and the sums received by beneficiaries of the plans.

If the person liable for the tax fails to make payment ASTA imposes liability on the plan. Apparently aware of the shaky ground upon which ASTA was treading, the Texas legislators provided that no tax liability would accrue if

collection or retention of the tax was preempted by federal law. Shortly before the first ASTA tax was due the Texas State Board of Insurance issued an emergency rule, now made permanent, that the "person" who first has possession or control over the assets "utilized or required by the payment of the gross amount of administrative or service fee ... shall be primarily liable for the tax." Tex.Admin.Code, title 28, § 7.1704(a). ASTA § 3(4) defines person to include any individual, corporation, plan, or other legal entity.

La Quinta Motor Inns, Inc. and E-Systems, Inc. (hereafter "sponsors") each developed an employee welfare benefits plan regulated by ERISA. They undertook the administrative and management functions of their plans, as well as the responsibility for appointment of plan administrators and amendment and termination of the plans, thus assuming a fiduciary relationship with their respective plans. Both plans are self-insured and self-administered, receiving contributions from the sponsors and, to a limited extent, from the employee participants. The State demanded payment of the tax, which the sponsors paid under protest. The sponsors filed separate suits, seeking a declaration that ERISA preempts ASTA and asking for appropriate injunctive relief. The district court first held that the suits were not barred by the Tax Injunction Act and then granted summary judgment to the plaintiffs, holding that ASTA is preempted by ERISA, as relates to the two plans

at issue, and enjoining further enforcement. The court ordered a return of the sums collected. The State timely appealed; we consolidated the cases for appellate consideration.

Analysis

The State first contends that the district court lacked jurisdiction to entertain these cases because of the Tax Injunction Act which provides that "district courts shall not enjoin, suspend, or restrain the assessment, levy or collection of any tax under the state law where a plain, speedy, and efficient remedy may be had in the courts of such state." 28 U.S.C. § 1341. This would include a declaratory judgment action. *California v. Grace Brethren Church*, 457 U.S. 393, 102 S.Ct. 2498, 73 L.Ed.2d 93 (1982). We find this argument unpersuasive because of the preemption factor. Congress empowered any participant or beneficiary of an ERISA-regulated plan to bring a civil action "to enjoin any act or practice which violates any provision of [ERISA] or the terms of the plan," 29 U.S.C. § 1132(a)(3), but Congress specifically directed the "exclusive jurisdiction" of such actions in the federal district courts. 29 U.S.C. § 1132(e). State courts lack jurisdiction to decide the dispositive issue in this case--whether ERISA preempts ASTA. It necessarily follows that there can be no effective state remedy under the Tax Injunction Act which, therefore, is inapplicable in an ERISA setting.

That leads then to the essential question: Does ERISA preempt in the cases at bar? Under the Supremacy Clause, Congress has the power to preempt state laws. U.S. Constitution, Art. VI. Did Congress exercise that power when it enacted ERISA? We conclude that it did, for Congress therein declared:

> Except as provided in subsection (b) of this section [the savings clause], the provisions of this title and title IV shall supersede any and all State laws insofar as they now or hereafter relate to any employee benefit plan described in section 4(a) [29 U.S.C. § 1003(a)] and not exempt under section 4(b) [29 U.S.C. § 1003(b)].

29 U.S.C. § 1144(a). The Supreme Court has given this clause a very broad reading, considering the language "deliberately expansive" in order to ensure that the regulation of employee benefit plans remains within the federal forum. *Pilot Life Insurance Co. v. Dedeaux,* 481 U.S. 41, 46, 107 S.Ct. 1549, 95 L.Ed.2d 39, 46 (1987). The preemptive scope of ERISA is "intended to apply in the broadest sense in all actions of State or local governments which have the force of law." *Id.*, 107 S.Ct. at 1552. Most recently the Court observed: "The pre-emption clause is conspicuous for its breadth. It establishes as an area of exclusive federal concern the subject of every state law that 'relate[s] to' an employee benefit plan governed by ERISA." *FMC Corporation*

v. Holliday, ___ U.S. ___, 111 S.Ct. 403, 407, 112 LEd.2d 356 (1990).

In *Holliday* the Court noted that the savings clause permitted the state to enforce its insurance regulations, subject to the limitations of the "deemer" clause. The Court declared:

> Under the deemer clause, an employee benefit plan governed by ERISA shall not be 'deemed' an insurance company, an insurer, or engaged in the business of insurance for purposes of state laws 'purporting to regulate' insurance companies or insurance contracts.

Id., 111 S.Ct. at 407.

Reflective of the broad reach of the statute, the Supreme Court has found preemption of state laws which only collaterally or indirectly affected employee benefit plans. *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 101 S.Ct. 1895, 68 L.Ed.2d 402 (1981).

The State asserts that ASTA does not "relate to" the plans, insisting that it does not affect "relations among the principal ERISA entities--the employer, the plan, the plan fiduciaries and the beneficiaries ...." *Sommers Drug Stores Co. Employee Profit Sharing Trust v. Corrigan Enterprises*, 793 F.2d 1456, 1467 (5th Cir. 1986), *cert. denied*, 479 U.S. 1034, 107 S.Ct. 884, 93 L.Ed.2d 837 (1987). The State contends

that ASTA's mere economic impact on a plan is an insufficient reason to invalidate the tax. We do not agree.

We are directed to give the term "relates to" the broadest possible reasonable interpretation. *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 96, 103 S.Ct. 2890, 2899, 77 L.Ed.2d 490 (1983). Even without doing so, it is apparent that ASTA "relates to" the two ERISA plans. Nearly all of the relationships referred to in *Sommers* are affected. The tax is calculated as, *inter alia*, a percentage of all claims paid and disbursements made by the plans each year. The payment is one year removed thus reducing future assets and the capability of the plans to pay benefits. The cost of the plan must therefore increase for the employer and/or employees or the benefits must be adjusted downward to offset the tax bite. This is the type of impact Congress intended to avoid when it enacted the ERISA legislation.

That Congress intended to preempt state taxation laws can no longer be gainsaid. When Congress amended ERISA to exclude Hawaii's Prepaid Health Care Act from the preemption clause, it added a specific provision that state tax laws were not exempt from preemption. 29 U.S.C. § 1144(b)(5)(B)(i). The conference report on the legislation is illuminating for it stated simply that "the preemption *is continued* with respect to ... any State tax law relating to employee benefit plans ...." 1982 U.S.Code Cong. &

Admin.News 4603 (emphasis added). The congressional intent appears clear, state tax laws were preempted even before they were specifically enumerated in the amended statute.

The Texas legislation is not saved by the insurance savings clause. Although that clause lifts the effect of the preemption from any state law which regulates "insurance, banking or securities," 29 U.S.C. § 1144(b)(2)(A), the deemer clause, 29 U.S.C. § 1144(b)(2)(B), declares that no state law regulating insurance shall deem an ERISA plan to be engaged in the business of insurance. Even if ASTA fit within the protective reach of the insurance savings clause, of which we are not persuaded, the deemer clause would prevent its application. Our conclusion is guided by the recent *Holliday* decision in which the Supreme Court instructed:

> We read the deemer clause to exempt self-funded ERISA plans from state laws that 'regulat[e] insurance' within the meaning of the savings clause. By forbidding States to deem employee benefit plans 'to be an insurance company or other insurer ... or to be engaged in the business of insurance,' the deemer clause relieves plans from state laws 'purporting to regulate insurance.' As a result, self-funded ERISA plans are exempt from state regulation insofar as that regulation 'relate[s] to' the plans.

111 S.Ct. at 409.

Having concluded that ASTA is preempted by ERISA we need proceed no further. The State received monies from the ERISA plans to which it was not entitled. The funds must be returned. The parties are to be restored to the status quo ante. That includes appropriate consideration of the loss of use of the funds for the period involved, an issue pending before this court in another appeal.

The judgment of the district court in each of the consolidated cases is AFFIRMED in all respects.

JOHN R. BROWN, Circuit Judge, concurring.

I concur fully in the Court's opinion. But in doing so, I wish to emphasize why the most potent threat to our decision--the Tax Injunction Statute, 28 U.S.C. § 1341--is non-existent.

Urged earnestly by Texas state authorities is the sweeping provision of the statute:

> The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State.

On the face of things, the complaint here is that ASTA is unconstitutional because it is

preempted by ERISA, the determination of which can, and ought to, be by Texas courts in the first instance. The awkwardness of this otherwise plausible contention is best illustrated by assuming we were to adopt it: because of ERISA's sweeping preemption, the Texas court having the injunction against the tax before it would have to determine whether that action was preempted. The Court's decision would raise thorny questions of review. Review would have to be through the Texas appellate hierarchy with the ultimate hope of Supreme Court review by certiorari. 28 U.S.C. § 1254 (Supp.1990). Not that the Texas appellate courts would not have the duty or power to determine the question of ERISA preemption, but the consequences of the Texas courts declaring such preemption would compel dismissal of the Texas court injunction effort.

Now all such confusing possibilities are eliminated by two recent opinions of the Texas Supreme Court,[1] especially in *Gorman*. In an exhaustive opinion by Justice Gonzalez, *Gorman* directly and in effect holds that where the controversy is preempted by ERISA, the state

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[1] *Pamela Chambers Gorman v. Life Insurance of North America, et al.*, ___S.W.2d ___ (1991) [34 The Texas Supreme Court Journal, 457].

James C. Cathey, et al. v. Metropolitan Life Insurance, et al., ____ S.W.2d ___ (Tex. 1991) [34 The Texas Supreme Court Journal, 309].

court lacks subject matter *jurisdiction* and that exclusive jurisdiction is in the federal courts.[2]

Except for state court cases asserting one or more of the three claims specifically identified in § 1132(a)(1)(B), ERISA preemption "would deprive state courts of subject-matter jurisdiction to hear the claim."[3] Unlike preemption as an "affirmative defense," which can be waived, preemption of the case as not within the limited scope of § 1132(a)(1)(B) "is jurisdictional in nature and cannot be waived."[4]

Since the Supreme Court of Texas, by its own deliverance, would have to hold a state court injunction suit preempted, there is nothing to be served by our initially requiring it.

Because of this consequence, we do not have to determine whether ERISA amounts, in effect, to an implied repeal of the federal Tax Injunction statute. Preemption by ERISA is self-executing to make the Tax Injunction statute of no consequence.

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[2] *See Gorman,* ___ S.W.2d ___ [34 Tex. Sup Ct. J. at 460].

[3] *Id.* at ___ [34 Tex.Sup.Ct. J. at 460].

[4] *Id.* at ___ [34 Tex.Sup.Ct. J. at 459].

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 90-8457
(Summary Calendar)

E-SYSTEMS, INC. GROUP HOSPITAL MEDICAL, AND SURGICAL INSURANCE PLAN, ET AL.,

Plaintiffs-Appellees,

versus

A. W. POGUE, Commissioner of the Texas State Board of Insurance,

Defendant-Appellant.

CONSOLIDATED WITH

No. 90-8460
(Summary Calendar)

LA QUINTA MOTOR INNS, INC.,

Plaintiff-Appellee,

versus

RICHARD F. REYNOLDS, Etc.,
ET AL.,

Defendants-Appellants.

Appeal from the United States District Court
for the Western District of Texas
(A-89-CA-148 & A-89-CA-447)

(May 14, 1991)

Before BROWN, POLITZ, AND JOHNSON, Circuit Judges.

PER CURIAM:*

In a parallel case we resolved the question of ERISA preemption and the applicability of the Tax Injunction Act to the Texas Administrative Services Tax Act, Tex. Ins. Code art. 4.11A. **E-Systems, Inc. Group Hospital Medical & Surgical Insurance Plan, Et Al. v. A. W. Pogue, Commissioner of the Texas State Board of Insurance**, No. 89-1707, consolidated with **La Quinta Motor Inns, Inc. v. Richard F. Reynolds, as a Member of the Texas State Board of Insurance, Et. Al.**, No. 89-1709,

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*Local Rule 47.5 provides: "The publication of opinons that have no precedential value and merely decide particular cases on the basis of well-settled principles of law impose needless expense on the public and burdents on the legal profession." Pursuant to that Rule, the court has determined that this opinion should not be published.

____ F.2d ____ (5th Cir. 1991). The sole issue presented by this appeal is the award of prejudgment and postjudgment interest.

Federal law clearly provides for postjudgment interest. "Interest shall be allowed on any money judgment in a civil case recovered in district court." 28 U.S.C. § 1961(a). The trial court appropriately allowed such.

The award of prejudgment interest under ERISA is discretionary with the trial court. **Whitfield v. Lindemann**, 853 F.2d 1298 (5th Cir. 1988), cert. denied, sub nom. **Klepak v. Dole**, 490 U.S. 1089 (1989). The trial court chose to make the plaintiffs whole by awarding in prejudgment interest the equivalent of the return on investments that the funds used to pay the taxes would have earned for the ERISA plans. Whether characterized as an award of damages or as prejudgment interest the result is the same -- the ERISA plans are made whole for the temporary loss of use of the funds improperly collected by the defendants. The parties are thus restored to *status quo ante*.

AFFIRMED.

Supreme Court of the United States

No. A-94

PHILIP W. BARNES, COMMISSIONER OF TEXAS STATE BOARD OF INSURANCE, ET AL.,
Applicants,

v.

E-SYSTEMS, INC. GROUP HOSPITAL MEDICAL & SURGICAL INSURANCE PLAN, ET AL.

ORDER

UPON CONSIDERATION of the application of the Attorney General of Texas,

IT IS ORDERED that the execution and enforcement of judgments of the United States Court of Appeals for the Fifth Circuit, case Nos. 89-1707, 89-1709, 90-8457 and 90-8460 are stayed pending the timely filing of a petition for a writ of certiorari. Should the petition for a writ of certiorari be so timely filed, this order is to remain in effect pending this Court's action on the petitiion (sic) for a writ of certiorari. If the petition for a writ of certiorari is denied, this stay is to terminate automatically. In the event the petition for a writ of certiorari is granted, this order is to remain in effect pending the sending down of the judgment of this Court.

s/ Antonin Scalia
Associate Justice of the
Supreme Court of the
United States

Dated this 2nd day of
August, 1991

SUPREME COURT OF THE UNITED STATES

A-94

PHILIP W. BARNES, COMMISSIONER OF TEXAS STATE BOARD OF INSURANCE, ET AL., APPLICANTS *v* E-SYSTEMS, INC. GROUP HOSPITAL MEDICAL & SURGICAL INSURANCE PLAN ET AL.

ON APPLICATION FOR STAY

[August 2, 1991]

JUSTICE SCALIA, Circuit Justice.

Texas state officials responsible for the collection of taxes and the regulation of insurance seek a stay of the judgments of the Court of Appeals for the Fifth Circuit in these two sets of consolidated cases, pending action by this Court on their intended petition for certiorari. The judgments at issue upheld decisions by the United States District Court for the Western District of Texas which declared the Texas Administrative Services Tax Act, Tex. Ins. Code Ann. art. 4.11A (Supp. 1991), to be preempted by the Employee Retirement Income Security Act (ERISA), 88 Stat. 829, as amended, 29 U.S.C. §1001, *et seq.* (1988 ed. and Supp. I), enjoined its enforcement, and directed the State to issue refunds to the challenging taxpayers. *E-*

Systems, Inc. v. *Pogue*, 929 F.2d 1100 (CA5 1991).

The authority for a single Justice to issue a stay of the sort requested here is conferred by 28 U.S.C. §2101(f). Before the predecessor to that provision was enacted in 1925, see Act of Feb. 13, 1925, 43 Stat. 940, similar action could be taken by the Court by issuing a *supersedeas* under the All Writs Act, 28 U.S.C. §1651. See *Magnum Import Co. v. Coty*, 262 U.S. 159 (1923); *Ex parte The Milwaukee Railroad Co.*, 72 U.S. (5 Wall.) 188, 190 (1867); *Hardeman v. Anderson*, 45 U.S. (4 How.) 640, 642-643 (1846). Under §2101(f), as under the All Writs Act and the prior common law, a stay issues not of right but pursuant to sound equitable discretion; "it requires," as Chief Justice Taft said, "a clear case and decided balance of convenience." *Magnum Import Co., supra*, at 164.

The practice of the Justices has settled upon three conditions that must be met before issuance of a §2101(f) stay is appropriate. There must be a reasonable probability that certiorari will be granted (or probable jurisdiction noted), a significant possibility that the judgment below will be reversed, and a likelihood of irreparable harm (assuming the correctness of the applicant's position) if the judgment is not stayed. *Times-Picayune Publishing Corp. v. Schulingkamp*, 419 U.S. 1301, 1305 (Powell, J., in chambers). In my view all three of these conditions are met here.

The Tax Injunction Act, 28 U.S.C. §1341, provides: "[t]he district courts shall not enjoin, suspend, or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State." The Fifth Circuit's holding that this provision does not apply to state taxes that violate ERISA is in apparent conflict with the position taken by the Ninth Circuit. See *Ashton v. Cory*, 780 F.2d 816, 821-822 (CA9 1986) (Kennedy, J.). See also *General Motors Corp. v. California Board of Equalization*, 815 F.2d 1305, 1308 (CA9 1987) (Kennedy, J.). The question has been explicitly reserved in an opinion of this Court. *Franchise Tax Board v. Construction Laborers Vacation Trust*, 463 U.S. 1, 20 n.21, 27 n.31 (1983). The establishment of an ERISA exception to the Tax Injunction Act is alone a matter of some importance to the States. In addition, however, the Fifth Circuit's basis for the exception is that there can be no "plain, speedy, and efficient remedy" in Texas courts because ERISA forbids *their* consideration of ERISA-preemption challenges. *E-Systems, Inc., supra*, at 1102. This means, apparently, that state courts cannot even grant refund relief, since we have held that refund relief alone may constitute "a plain, speedy, and efficient remedy." See, *e.g.*, *California v. Grace Brethren Church*, 457 U.S. 393, 413-414 (1982); *Rosewell v. LaSalle National Bank*, 450 U.S. 503, 514-515 (1981). In addition, the Fifth Circuit rejected without explanation, applicants' objection that

the Eleventh Amendment forbade the district court from requiring a refund of the ERISA-preempted taxes from Texas's State Treasury. *E-Systems, Inc., supra*, at 1101-1102. This is also in apparent conflict with the views of the Ninth Circuit. See *General Motors Corp. supra*, at 1309. In my view these issues are of sufficient importance that a grant of certiorari by this Court is probable.

I also think there is a substantial possibility that the judgment below will be reversed. The Fifth Circuit's construction of the Tax Injunction Act and ERISA assumes that ERISA's creation of a private cause of action to enjoin violations of ERISA, 29 U.S.C. §1132(a)(3), and, its provision that this cause of action can be brought only in federal court, *id.* §1132(e)(1), implicitly deprive the state courts of jurisdiction to entertain claims for monetary or equitable relief that rest upon the invalidity (under the Supremacy Clause) of a state statute that violates ERISA. That is not an inevitable implication, and perhaps not a likely one. The Fifth Circuit's position on the Eleventh Amendment presumably rests upon the proposition that ERISA has impliedly authorized suit against states for monetary (as well as injunctive) relief, thus abrogating state sovereign immunity. But ERISA makes no mention of monetary relief, and in any event our cases do not favor implicit abrogation of Eleventh Amendment immunity. See *Dellmuth v.*

Muth, 491 U.S. 223, 230 (1989); *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 242 (1985).

As to the third condition, the likelihood of irreparable harm: In my view the Tax Injunction Act itself reflects a congressional judgment, with which I agree, that unlawful interference with state tax collection always entails that likelihood. It produces in all cases not merely the possibility of ultimate noncollection because of the taxpayer's exhaustion of the funds but also an interference with the State's orderly management of its fiscal affairs.

> "It is upon taxation that the several States chiefly rely to obtain the means to carry on their respective government, and it is of the utmost importance to all of them that the modes adopted to enforce the taxes levied should be interfered with as little as possible. Any delay in the proceedings of the officers, upon whom the duty is devolved of collecting the taxes, may derange the operations of government, and thereby cause serious detriment to the public." *Dows v. City of Chicago*, 78 U.S. (11 Wall.) 108, 110 (1871).

See also *California v. Grace Brethren Church, supra*, at 410 and n. 23. The same may be said of the asserted Eleventh Amendment violation: directing a priority expenditure from the state

treasury "may derange the operations of government, and thereby cause serious detriment to the public."

The conditions that are *necessary* for issuance of a stay are not necessarily *sufficient*. Even when they all exist, sound equitable discretion will deny the stay when "a decided balance of convenience," *Magnum Import Co., supra*, at 262 U.S., at 164, does not support it. It is ultimately necessary, in other words, "to 'balance the equities' -- to explore the relative harms to applicant and respondent, as well as the interests of the public at large." *Rostker v. Goldberg*, 448 U.S. 1306, 1308 (1980) (Brennan J., in chambers) (citations omitted). The likelihood that denying the stay will permit irreparable harm to the applicant may not clearly exceed the likelihood that granting it will cause irreparable harm to others. (This depends, of course, not only upon the relative likelihood that the merits disposition one way or the other will produce irreparable harm, but also upon the relative likelihood that the merits disposition one way or the other is correct). Or the irreparable harm threatened to the applicant, while more likely, may be vastly less severe. The balancing seems to me quite easy in the present case, since I am aware of no irreparable harm that granting the stay would produce. The State's credit remains good, and I have been advised of no emergency need for the funds already paid under protest or for any funds that will be collected before termination of this litigation.

The application for stay of the judgments of the Fifth Circuit Court of Appeals is granted, pending applicants' timely filing and this Court's disposition of a petition for certiorari.

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF TEXAS

AUSTIN DIVISION

E-SYSTEMS, INC. GROUP HOSPITAL MEDICAL AND SURGICAL INSURANCE PLAN, ET AL	§	CIVIL NO. A-89-CA-148
VS.	§	
A. W. POGUE, COMMISSIONER OF THE TEXAS STATE BOARD OF INSURANCE	§	

ORDER

Before the Court is Defendant's Motion to Dismiss, as well as Plaintiffs' response. For the reasons set forth in this Court's November 17, 1988 Order in John R. Birdsong, et al. v. Edwin J. Smith, Jr., et al., Cause No. A-88-CA-185, the Court will Deny Defendant's Motion.

ACCORDINGLY, IT IS ORDERED that Defendant's Motion to Dismiss is DENIED.

SIGNED AND ENTERED this 6th day of July, 1989.

/s/James R. Nowlin
JAMES R. NOWLIN
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF TEXAS

AUSTIN DIVISION

LA QUINTA MOTOR INNS, INC.	§	
	§	
VS.	§	CIVIL NO.
	§	A-89-CA-447
RICHARD F. REYNOLDS AS	§	
A MEMBER OF THE TEXAS	§	
STATE BOARD OF	§	
INSURANCE, ET AL.	§	

ORDER

Before the Court is Defendants' May 12, 1989 Motion to Dismiss, as well as Plaintiff's May 19, 1989 response. This Court has previously considered all of the arguments for dismissal raised by Defendants in this proceeding. In John R. Birdsong, et al. v. Edwin J. Smith, et al., Cause No. A-88-CA-185, the (sic) entered an Order considering the arguments and finding them without merit. For the reasons articulated in this Order of the Court, entered in Birdsong on November 17, 1988, the Court will deny Defendants' Motion to Dismiss filed in this action.

ACCORDINGLY, IT IS ORDERED that Defendants' Motion to Dismiss is DENIED.

SIGNED AND ENTERED this 23rd day of May, 1989.

/s/James R. Nowlin
JAMES R. NOWLIN
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF TEXAS

AUSTIN DIVISION

JOHN R. BIRDSONG, ET AL.	§	
VS.	§	CIVIL NO. A-88-CA-185
EDWIN J. SMITH, JR., ET AL.	§	(CONSOLIDATED)

ORDER

Before the Court for consideration are Defendants' numerous Motions to Dismiss which have been filed in the twelve cases which have been consolidated and are proceeding under the above-styled and numbered cause.[1] The several Plaintiffs involved in this controversy filed responses to the Motions to Dismiss which the Court has considered. The Court, after reviewing the Motions to Dismiss and the responses thereto as well as the entire record in this case, finds

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[1]The twelve consolidated cases are listed in the Court's consolidation order filed August 15, 1988. In each of those cases prior to consolidation, Defendants filed essentially the same motion to dismiss raising identical arguments for dismissal. The Court has reviewed each motion and enters this Order which addresses all of Defendants' arguments. This Order therefore disposes of each and every motion to dismiss filed in the cases prior to consolidation.

that the motions lack merit and should be denied for the following reasons.

This is a consolidated action for declaratory, injunctive, and other equitable relief arising under section 502(a)(3) of the Employee Retirement Income Security Act of 1974, as amended ("ERISA"), 29 U.S.C. § 1132(a)(3), and the United States Constitution. The Plaintiffs involved in this consolidation action consist of "employee welfare benefit plans" and "fiduciaries" of or "participants" in such plans within the meaning of ERISA. See, 29 U.S.C. §§ 1002(1), (7) and (21)(A). Defendants are various officials of the State of Texas who are charged with enforcing Article 4.11A of the Texas Insurance Code, otherwise known as the Texas Administrative Services Tax Act ("ASTA"). See TEX. INS. CODE ANN. art. 4.11A (Vernon Supp. 1988). Plaintiffs have filed these consolidated lawsuits alleging that ASTA and the Emergency Rule implementing the Act, 28 T.A.C. §§ 7.1701-7.1711 (Feb. 26, 1988), are preempted by section 514 of ERISA and violate the supremacy clause of Article VI of the United States Constitution. Several of the Plaintiffs which have already made quarterly payments under protest seek a return of those payments in addition to declaratory and injunctive relief. Defendants have responded to these allegations by filing the motions to dismiss under consideration, generally raising the four following arguments in support of dismissal:

1. that the Court lacks subject matter jurisdiction over this controversy and that plaintiffs have failed to state a claim upon which relief may be granted since the Tax Injunction Act, 28 U.S.C. § 1341, bars the entire action;

2. that the principle of comity warrants the dismissal of this action;

3. that the abstention doctrines warrant the dismissal of this action; and

4. that the Eleventh Amendment bars this action.[2]

See Defendants' Motion to Dismiss filed August 19, 1988 in Smith Industries, Inc. v. Doyce R. Lee, et al., A-88-CA-625.

The Court shall address each of these alternative arguments for dismissal in turn and demonstrate why dismissal is inappropriate.

I. THE TAX INJUNCTION ACT DOES NOT BAR THIS ACTION.

The Tax Injunction Act provides:

The district court shall not enjoin, suspend

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[2]Defendants also argue in two individual cases, John R. Birdsong, et al. v. Edwin J. Smith, Jr., et al., A-88-CA-185, and Dan Harding, et al. v. Edwin J. Smith, et al., A-88-CA-239, that certain Plaintiffs suing as plan participants lack "taxpayer" standing to bring these actions under Article 4.11A of ASTA. Defendants' challenge to the standing of these particular Plaintiffs is misplaced, however, since these Plaintiffs are authorized as participants to bring these claims under ERISA §§ 502(a) and (e).

> or restrain the assessment, levy or collection of any tax under state law where a plain, speedy, and efficient remedy may be had in the courts of such states.

28 U.S.C. § 1341. Section 503(a)(3) of ERISA allows a "participant, beneficiary, or fiduciary" to enjoin alleged violations of ERISA or to enforce provisions of ERISA. Section 502(e)(1) of ERISA states in pertinent part that "the district courts of the United States shall have exclusive jurisdiction of civil actions under this subchapter brought by the Secretary [of Labor], or by a participant, beneficiary, or fiduciary." Although sections 502(a)(3) and (e)(1) do not specifically refer to the Tax Injunction Act, section 514(d) of ERISA provides:

> Nothing in this subchapter shall be construed to alter, amend, modify, invalidate, impair, or supersede any law of the United States . . .

The initial question is whether ERISA constitutes an exception to the Tax Injunction Act. In other words, does the Tax Injunction Act bar a plaintiff's action in federal court challenging that a state tax is preempted by ERISA. The Fifth Circuit has not yet resolved this issue. The Ninth Circuit, however, addressed this issue in, Ashton v. Cory, 780 F.2d 816 (9th Cir. 1986), a case involving procedural circumstances significantly different than those present in this action. The Ninth Circuit found

that Congress did not intend for ERISA section 502(e)(1) to be an exception to the Tax Injunction Act. Id. at 822. The United States Supreme Court, in Franchise Tax Board v. Construction Laborers Vacation Trust, 463 U.S. 1, 20 n.21 (1983), recognized but did not resolve the apparent conflict between ERISA and the Tax Injunction Act. The Court stated that in order for a Plaintiff to sue under ERISA to enjoin or declare invalid a state tax levy despite the Tax Injunction Act, the Plaintiff must show either that the state law provides no "plain, speedy, and efficient remedy" or that Congress intended section 502 of ERISA to be an exception to the Act. Id. In the present case, Plaintiffs have advanced various arguments in support of both of these points. The Court finds that Plaintiffs have shown that an adequate remedy is not available in state court and that the Tax Injunction Act should not bar this action.

It is well-settled that "a state-court remedy is 'plain, speedy and efficient' only if it 'provides the taxpayer with a 'full hearing and judicial determination' at which she may raise any and all constitutional objections to the [disputed state] tax.'" California v. Grace Brethren Church, 457 U.S. 393, 411 (1981). It is also clear that some opportunity to raise constitutional objections is the most important consideration in deciding whether the state court remedy is adequate. Id. at 412 n.26; Rosewell v. La Salle National Bank, 450 U.S. 503, 515, 517 n.19 (1981). A state remedy, moreover, is not

plain within the meaning of the Tax Injunction Act, if there is uncertainty regarding its availability or effect. Such uncertainty lifts the bar to federal court jurisdiction. Rosewell, 450 U.S. at 516-17. The Court is of the view that Plaintiffs have adequately demonstrated that there exists a substantial amount of uncertainty regarding the various state remedies which Defendants claim are available.

First, to the extent that any Plaintiff seeks a declaratory judgment that ASTA violates the Supremacy Clause of the United States Constitution through the application of ERISA section 514, such action can only be maintained in federal court under the exclusive jurisdiction provision of section 502(e). General Motors v. California Board of Equalization, 815 F.2d 1305, 1309 (9th Cir. 1987), cert. denied, 108 S.Ct. 1122 (1988). A Texas state court would lack jurisdiction of any action commenced by Plaintiffs challenging the validity of the ASTA tax under ERISA's preemption clause, section 514, thereby depriving Plaintiffs of any state judicial determination of this important consitutional issue. Further, even though a defensive claim of ERISA preemption raised by a plan fiduciary, participant or beneficiary does not provide a basis for federal removal jurisdiction and would therefore have to be addressed by the state court, Franchise Tax Board, 463 U.S. at 21-22, the procedural posture and party alignment involved in the tax protest suits currently pending in state court would not

allow for a judicial determination of the preemption issue.

In addition, those Plaintiffs who do not constitute taxpayers within the meaning of ASTA have no remedy in state court. Under ASTA, a "taxpayer" is granted a right to challenge the statute which he may exercise pursuant to Chapter 112 of the Tax Code only by rendering a payment under protest and then filing suit. TEX. INS. CODE ANN. art. 4.11A § 9(a) (Vernon Supp. 1988). Defendants argue that an additional remedy lies in section 112.101 of the Tax Code which authorizes injunction actions by persons who have paid a disputed tax or filed a bond in lieu of paying the tax. This injunctive remedy, as in the case of the protest suits, would be available only to a party recognized as a taxpayer.

Defendants concede that "the plan is not a taxpayer under Texas law" and that "it is not the intent of the State of Texas to tax the plan." See Defendants' Memorandum of Law in Support of Motion to Dismiss, p. 3, filed August 19, 1988 in Smith Industries, Inc. v. Doyce R. Lee, et al., A-88-CA-625. Defendants base this concession upon section 4(d) of ASTA which states that "the tax imposed under this article creates no duty and shall not be collected to the extent preempted or prohibited under the constitution of this State or the United States." Defendants further admit that "the plan itself cannot be taxed if to do so would be derogation of applicable state and

federal laws". Id. Thus, in deciding not to recognize plans as ASTA taxpayers, Defendants have effectively precluded these plans from utilizing the exclusive remedies made available under section 9(a) of ASTA. The Plaintiff plans involved in the pre-consolidation case of The LTV Corp., et al. vs. Edwin J. Smith, Jr., et al., A-88-CA-517, as nontaxpayers would therefore be unable to file a protest suit under ASTA section 9(a) or seek injunctive relief under section 112.101 of the Tax Code. Additionally, the individual Plaintiff participants, who are employees of the sponsoring employers and are members of the various plans on behalf of which Plaintiff fiduciaries are suing, obviously are not ASTA taxpayers and would therefore also be unable to seek relief through a protest suit or an injunction action.

Finally, with respect to the Plaintiff fiduciaries involved in this action, it is at best uncertain whether they are considered taxpayers under either ASTA or section 112.101 of the Tax Code. The main argument advanced by this group of Plaintiffs is that the collection of any taxes from them under ASTA violates the supremacy clause of the United State Constitution by virtue of ERISA's preemption clause, § 514, 29 U.S.C. § 1144. Applying the same reasoning employed by Defendants in conceding that the plans themselves are not considered taxpayers, Plaintiff fiduciaries also could not be taxed under the express prohibition contained in section 4(d) of ASTA if ERISA preempts the ASTA

taxation of these fiduciaries. Moreover, the Plaintiff fiduciaries have brought their suits under ERISA section 502(a) on behalf of their respective plans. Since Defendants concede that the plans are not taxpayers, their fiduciaries, who sue on their behalf, likewise cannot be considered taxpayers, at least in the capacity in which they have filed their ERISA claims.

In addition to the tax protest procedures and injunctive relief, Defendants claim that Plaintiffs have the alternative remedy afforded by section 9(b) of ASTA of filing a refund suit with legislative consent. As stated by the Plaintiffs in Texas LP-Gas Master Insurance Trust, et al. v. Edwin J. Smith, Jr., et al., A-88-CA-214:

> This requires that an aggrieved party convince a state legislator to introduce a bill specifically authorizing a suit against the State for a refund of the [ASTA tax] wrongfully collected. This bill then must be passed by the Legislature which, although it customarily passes such bills, can, and has, voted them down. Such a remedy during an economic downturn is highly speculative and hardly the "plain, speedy and efficient remedy" contemplated by the Tax Injunction Act.

See Plaintiffs' Response in Opposition to Defendants' First Amended Motion to Dismiss, filed May 18, 1988.

Assuming, for the sake of analysis, that Plaintiffs do have standing or could readily obtain legislative consent to file suit for a refund, the Court finds that the availability of a refund under ASTA is highly uncertain as demonstrated by the Defendants' own representations. On May 13, 1988, the Court entered an Order denying Plaintiffs' request to deposit tax payments into the registry of the Court. This Order was entered in the case of American Airlines, Inc., et al. v. Doyce R. Lee, Commissioner of the Texas State Board of Insurance, A-88-CA-186, prior to consolidation. The Court found that Plaintiffs had not demonstrated there was a substantial likelihood that taxes paid pursuant to ASTA could not be refunded. The Court made this finding on the basis of the Defendants' representations that adequate authority for the refund existed under Texas Government Code § 403.076, and the Appropriations-General Act, ch. 78, § 29, 1987 Tex. Sess. Law. Serv. 515, 1108 (Vernon). The Court also expressly relied upon the corroborating affidavit testimony of T. C. Mallet, Director of Fund Accounting and Executive Assistant for Budget Administration of the Office of the Comptroller Public Accounts of the State of Texas.

On September 26, 1988, the Honorable Pete Lowry, state district judge, entered a temporary injunction order in favor of the Plaintiffs in ARCO Employee Welfare Benefit Trust, et al. v. Doyce R. Lee, et al., No. 443,515, a related case

pending in the 53rd Judicial District Court of Travis County, Texas. At the September 12, 1988 hearing held on this matter, the state Defendants once again argued that a refund of taxes paid under ASTA was available. The state Defendants, however, claimed that Texas Government Code section 403.077, rather than section 403.076 of the Texas Government Code and section 29 of the Appropriations-General Act, provided the statutory basis for refund. Mr. T. C. Mallett, in fact, testified at the hearing and admitted that section 403.076 does not provide any authority for a refund of ASTA tax payments. See State Court Transcript, p. 156, lines 17-19. Mr. Mallett's testimony also indicates that (1) an ASTA refund has never been made, (2) he has never actually conferred with the Comptroller regarding ASTA refunds, and (3) he has not considered the effect of the State legislature's assertion of sovereign immunity with respect to refunds pursuant to section 9(b) of ASTA. Id. at pp. 152-154, 170. Now that the State has abandoned section 403.076 as a basis for a refund, the Court must determine whether section 403.077 provides an avenue for the Plaintiffs to seek a refund.

Section 403.077 authorized a refund of money collected "through mistake of fact or law." The Texas Supreme Court construed this precise language in Bullock v. Hewlett-Packard Co., 628 S.W.2d 754 (Tex. 1982), and held that a legislative enactment of an allegedly unlawful tax is "not the kind of 'mistake of law' covered

[by the predecessor statutory provision to section 403.077]." Id. at 757. The State through the testimony of Mr. Mallett has now conceded that neither section 29 of the Appropriations-General Act nor section 403.076 authorize a refund of the ASTA tax. The Court has found that section 403.077 does not apply. Therefore, the absence of a means for obtaining a refund serves as additional proof that the remedy required by the Tax Injunction Act is lacking.

In summary, Plaintiffs do not have a plain, speedy and efficient remedy in state court since: (1) the state courts lack jurisdiction to render a declaratory judgment that ASTA violates the Supremacy Clause of the United States Constitution through the application of ERISA's preemption clause; (2) Plaintiffs, to the extent they are considered nontaxpayers or nontaxable, lack standing to file a tax protest suit under ASTA section 9 or seek injunctive relief under section 112.101 of the Tax Code; (3) it is highly speculative that Plaintiffs could obtain legislative consent to sue the state for a tax refund; and (4) Plaintiffs have demonstrated through the inconsistent positions taken by the Defendants that it is unlikely that a refund could be obtained even if suit were allowed. In any event, the Court finds that there is a sufficient amount of uncertainty concerning each of the state remedies described above as to make them speculative. The Tax Injunction Act is therefore inapplicable. Rosewell, 450 U.S. at 516-17.

II. THE PRINCIPLES OF COMITY AND DOCTRINES OF ABSTENTION DO NOT WARRANT A DISMISSAL OF THIS ACTION.

Defendants urge the Court to adhere to the equitable principle of comity by declining to interfere with the state's ASTA tax collection process. They base this alternative argument primarily on the decisions by the U.S. Supreme Court in Fair Assessment in Real Estate Association, Inc. v. McNary, 102 S.Ct. 177 (1980), and the Ninth Circuit in Ashton v. Cory, 780 F.2d 816 (9th Cir. 1986), which Defendants contend stand for the proposition that comity concerns may constitute a bar to an action separate and apart from the Tax Injunction Act itself. Judge Kennedy in the Ashton decision did conclude that "the interest in uniformity [in ERISA law] . . . yields here to the paramount principles of comity and deference to the revenue collection procedures of the individual states provided the state courts afford a plain, speedy, and efficient remedy for challenging state assessments." Id. at 822 (emphasis added). In the F.A.I.R. case, the Supreme Court held that "taxpayers are barred by the principle of comity from asserting § 1983 actions against the validity of state tax systems in federal courts." F.A.I.R., 102 S. Ct. at 186 (sic). The Court further held, however, that "such taxpayers must seek protection of their federal rights by state remedies, provided of course that those remedies are plain, adequate, and complete, and may ultimately seek review of

the state decisions in this Court." Id. (citations omitted) (emphasis added).

The Court has previously found the purported state remedies in this case to be unavailable and inadequate for purposes of the Tax Injunction Act. It is clear therefore that a consideration of the principle of comity as an alternative jurisdictional bar to this action is inappropriate under the authorities relied upon by Defendants. The Court therefore rejects Defendants' comity argument.

The Court also finds that abstention is not proper under the circumstances presented in this ERISA case. See General Motors Corp. v. California Board of Equalization, 815 F.2d 1305 (9th Cir. 1987), cert. denied, 108 S.Ct. 1122 (1988); Medema v. Medema Builders, Inc., 854 F.2d. 210 (7th Cir. 1988).

III. THE ELEVENTH AMENDMENT IS NOT A JURISDICTIONAL BAR IN THIS CASE.

Defendants urge in their memorandum of law as their final argument for dismissal that "all causes of action for money damages or other relief against the State of Texas are absolutely barred by the Eleventh Amendment." In the interest of judicial economy, the Court will not describe the various responses filed by the Plaintiffs to this rather broad generalized assertion of immunity. The Fifth Circuit recently described the law applicable to this

issue in Brennan v. Stewart, 835 F.2d 1248 (5th Cir. 1988);

> The Eleventh Amendment and the doctrine of Ex Parte Young, together create a relatively simple rule of state immunity. Basically, prospective injunctive or declaratory relief against a state is permitted--whatever its financial side-effects--but retrospective relief in the form of a money judgment in compensation for post (sic) wrongs--no matter how small--is barred.

Id. at 1253. This Court, in applying the Brennan guidelines, must separately examine each claim to determine if that claim is barred by the Eleventh Amendment. Pennhurst State School v. Haldeman, 465 U.S. 89, 121 (1984).

A state's right to invoke the Eleventh Amendment may be curtailed by a Congressional enactment which indicates an intent to abrogate its immunity. Fitzpatrick v. Bitzer, 427 U.S. 445 (1976). The Supreme Court has held that states may be sued in federal court where Congress has passed a statute, pursuant to one of its exclusive legislative powers, in which it has expressed an intent that suits against the state under the statute not be barred by the Eleventh Amendment. Atascadero State Hospital v. Scanlon, 473 U.S. 234, 243 (1985). Once a Congressional waiver of a state's Eleventh Amendment immunity has been established, a plaintiff may obtain

monetary relief notwithstanding the fact that such funds will be paid by the state. 13 C. Wright & A. Miller, Federal Practice & Procedure § 3524, at 190 (1986).

ERISA was enacted pursuant to Congress' power under the Commerce Clause. The Congressional findings which prompted ERISA clearly reflect Congress' overriding concern with the substantial impact which employee benefit plans have upon interstate commerce. 29 U.S.C. §§ 1001(a), (b) and (c). Through the enactment of ERISA, Congress sought to "protect interstate commerce and the interests of participants in employee benefit plans . . . by providing for appropriate remedies, sanctions, and ready access to the federal courts." 29 U.S.C. § 1001(b) (emphasis added). In order to effectuate this policy, Congress established employee benefit plan regulation as an exclusive federal concern by eliminating conflicting state and local regulation. 29 U.S.C. § 1144(a). In this connection Congress specifically provided for the preemption of "any State tax law" which relates to employee benefit plans. 29 U.S.C. § 1144(b)(5)(B)(i).

In order to further prevent state regulation which would defeat Congress' intent to protect interstate commerce, Congress authorized plan fiduciaries, participants, and the Secretary of Labor to bring suit seeking appropriate redress for violations of ERISA's preemption clause, including violations deriving from the imposition

of an impermissible state tax law. 29 U.S.C. § 1132(a)(3).[3] Significantly, section 1132(a)(3) does not exclude suits seeking redress for violation of the ERISA preemption clause caused by the enactment of an impermissible state tax law. Consequently, under a plain reading of the statute, Congress authorized suits to obtain relief for a state's violation of the preemption clause through the enactment of a state tax law which relates to employee benefit plans. Congress not only authorized such suits, but also vested the exclusive jurisdiction for such suits in the federal district courts. 29 U.S.C. § 1132(e)(1). By vesting the exclusive jurisdiction of civil actions relating to the preemption of state tax laws in the federal district courts, Congress has abrogated the state's Eleventh Amendment immunity. Consequently, Plaintiffs' claim for restitution of taxes paid pursuant to ASTA is not prohibited by the Eleventh Amendment.

Furthermore, Plaintiffs' claims for recovery of attorneys' fees are also not prohibited by the Eleventh Amendment. The

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[3]29 U.S.C. § 1132(a)(3) authorizes civil actions by a participant, beneficiary, or fiduciary to enjoin any act or practice which violates the provisions of ERISA or to obtain other appropriate equitable relief to redress such violations. In the instant case Plaintiffs seek the restitution of tax payments unlawfully exacted. Under general law, a claim for such relief is regarded as equitable in nature. See Curtis v. Loether (sic), 415 U.S. 189, 197 (1974). Consequently, the reference in section 1132(a)(3) to "other appropriate equitable relief" contemplates the type of relief sought by Plaintiffs.

Supreme Court has recognized that "the line between retroactive and prospective monetary relief cannot be so rigid that it defeats the effective enforcement of prospective relief." Hutto v. Finney, 437 U.S. 678, 690 (1978). Consequently, the Supreme Court has held that expenditures from the state treasury which are ancillary to a claim for prospective injunctive or declaratory relief are not barred by the Eleventh Amendment. Milliken v. Bradley, 433 U.S. 167 (1977); Brennan, 834 F.2d at 1253. Attorneys' fees have been recognized by the Supreme Court as a type of such ancillary relief. Hutto, 437 U.S. at 691.

An award of attorneys' fees in this case is necessary for the effective enforcement of Plaintiffs' claims for prospective injunctive and declaratory relief. The provisions of ERISA indicate Congress' concern with respect to providing individuals such as Plaintiffs "ready access to the federal courts" to seek redress for ERISA violations. 29 U.S.C. § 1001(b). In order to further ensure the availability of such access, Congress provided for the recovery of attorneys' fees. 29 U.S.C. § 1132(g)(1). Consequently, in order for Plaintiffs to obtain full and effective redress for Defendants' violations of ERISA, the recovery of attorneys' fees is necessary ancillary relief to Plaintiffs' claims for declaratory and injunctive relief.

For all of the foregoing reasons, the Court finds that Defendants' Motions to Dismiss lacks merit and should be Denied.

IT IS THEREFORE ORDERED that Defendants' Motions to Dismiss are hereby DENIED.

SIGNED and ENTERED this 17th day of November, 1988.

/s/ James R. Nowlin
JAMES R. NOWLIN
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF TEXAS

AUSTIN DIVISION

E-SYSTEMS, INC. GROUP HOSPITAL MEDICAL AND SURGICAL INSURANCE PLAN, ET AL.	§	CIVIL NO. A-89-CA-148
VS.	§	
A. W. POGUE, COMMISSIONER OF THE TEXAS STATE BOARD OF INSURANCE	§	

ORDER

Before the Court is Plaintiff's Motion for Summary Judgment, as well as Defendant's response. The Court has previously granted summary judgment for Plaintiffs arguing that the Administrative Services Tax Act ("ASTA"), Tex. Ins. Code Ann. art. 4.11A (Vernon Supp. 1988) is preempted by the Employee Retirement Income Security Act ("ERISA"). See Birdsong v. Olson, 708 F. Supp. 792 (W.D. Tex. 1989).

A. Standard of review

Rule 56(c) permits the Court to grant a motion for summary judgment when it appears from the affidavits and other exhibits on file with the Court that there is no genuine issue of

material fact for trial, and when the movant is entitled to summary judgment as a matter of law. FED. R. CIV. P. 56(c). See also Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). In reviewing a motion for summary judgment, the Court must view the evidence in the light most favorable to the party opposing the motion, and indulge all reasonable inferences in that party';s favor. Pharo v. Smith, 621 F.2d 656, 664 (5th Cir. 1980).

The Supreme Court's 1986 summary judgment trilogy is by now well-known. In the three cases, the Court set out new rules governing the application of Rule 56. In the first case, Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986), the Court discussed the difference between "material" and "immaterial" issues of fact. The Court stated that a "material" issue is one that could affect the outcome of the suit under the applicable law. Id. at 248. The second case was Celotex Corp. v. Catrett, 477 U.S. 317 (1986). In that case, the Court held that a movant for summary judgment can prevail by showing that its opponent is unable to produce evidence in support of its claim, and that no affidavits or other summary judgment evidence is necessary in such a situation. Id. at 322-24. Finally, in Matsushita Electric Industrial Co. Ltd. v. Zenith Radio Corp., 475 U.S. 574 (1986), the Court held that when a movant produces a prima facie case, the opposing party must come forward with specific facts to show that there

is a genuine issue for trial, or else summary judgment is proper. Id. at 587.

Defendant contends that there are genuine issues of material fact as to whether the health plans at issue are health and welfare plans as defined by ERISA, and as to the funding of the health plans and how and by whom the contributions ar (sic) received. Defendant, however, has failed to present any evidence controverting Plaintiff's affidavits, and cannot rest on their pleadings to establish a genuine issue of material fact. Galindo v. Precision American Corp., 754 F.2d 112 (sic), 1216 (5th Cir. 1985). The Court finds that there is no genuine issue as to the following facts.

B. Findings of Fact

Plaintiffs are either benefit plans that provide medical, dental, hospital, accident, death, and/or disability benefits for employees, including benefits for employees in Texas, trusts through which those plans are funded, or administrators and/or sponsoring employers of the plans. As such, the plans are employee welfare benefit plans under ERISA. The plans are self-insured in whole or in part and receive funds from their sponsoring employers from which the plans pay compensation for administrative services performed in Texas and from which the plans also pay claims and benefits. The taxes paid to Defendant pursuant

to ASTA and in relation to the Plaintiffs herein total $1,658,639.25.

C. Conclusions of Law

Plaintiffs are in the same position as the plaintiffs in Birdsong and are entitled to the entry of summary judgment for the reasons set forth in the opinion earlier rendered by this Court. Birdsong v. Olson, 708 F.Supp 792 (W.D. Tex. 1989). The Court will consider any application for attorneys' fees and costs which Plaintiffs may file, but states no opinion whether assessment of fees and costs is authorized or appropriate in this case.

Plaintiffs contend that they are entitled to an award of prejudgment interest pursuant to 29 U.S.C. §1132(a)(3)(B), which permits fiduciaries, beneficiaries, and participants to bring a civil action to obtain appropriate equitable relief. Plaintiffs acknowledge that ERISA does not expressly address the awarding of interest, but contend that the legislative intent and general principles of equity compel such an award. See Rodgers v. United States, 332 U.S. 371, 373 (1947); see also National Home for Disabled Volunteer Soldiers v. Parrish, 229 U.S. 494 (1913). The Fifth Circuit has held that the award of prejudgment interest in ERISA cases is discretionary with the trial court. Whitfield v. Lindemann, 853 F.2d 1298, 1306 (5th Cir. 1988). The purposes of ERISA are set out in 29 U.S.C. § 1001, and include preserving the financial

soundness of employee welfare plans. A common sense reading of the statute leads the Court to conclude that an award of prejudgment interest is warranted when a state has collected taxes contrary to the preemption clause of ERISA. Considerations of fairness should guide the trial court in making its determination. Blau v. Lehman, 368 U.S. 403, 414 (1962). An award is appropriate to compensate for use of the funds. Lindemann, 853 F.2d at 1306. This Court concludes that the State of Texas has enjoyed the interest-free use of the taxes paid under ASTA. Pursuant to Tex. Tax Code Ann. § 112.058(e)(2) (Vernon Supp. 1988), the tax funds may not be placed in a suspense account but shall be immediately deposited.

Plaintiffs request prejudgment interest only on the taxes paid directly to the state, and not on taxes paid in interest bearing accounts pursuant to a temporary restraining order entered by a state court. Plaintiffs request that prejudgment interest be awarded at the rate set forth in 28 U.S.C. § 1961(a):

> at a rate equal to the coupon issue yield equivalent (as determined by the Secretary of the Treasury) of the average accepted auction price for the last auction of fifty-two week United States Treasury bills settled immediately prior to the date of the judgment.

The Court is of the opinion that an award of prejudgment interest is appropriate, but that 28 U.S.C. § 1961(a) is not necessarily the proper method for calculating that interest. The Fifth Circuit in Lindemann suggests that the rate of income received by an ERISA plan in its investments is the appropriate measure for prejudgment interest, 853 F.2d at 1306, and Plaintiffs have presented no evidence regarding this rate. The Court will deny Plaintiffs' request for prejudgment interest at this time.

ACCORDINGLY, IT IS ORDERED that Plaintiffs' Motion for Summary Judgment is GRANTED; and that judgment is hereby entered in favor of the Plaintiffs.

IT IS FURTHER ORDERED that Article 4.11A of the Texas Insurance Code, also known as the Administrative Service (sic) Tax Act, is null and void under the Supremacy Clause of the United States Constitution to the extent that it imposes a tax on any ERISA-covered employee welfare benefit plan or any such plan's sponsoring employers, fiduciaries, employee participants, or administrative service providers, including the Plaintiffs herein.

IT IS FURTHER ORDERED that Defendant and his agents are enjoined from seeking, directly or indirectly, to collect from any of the Plaintiffs herein, any of Plaintiffs' sponsoring employers, employee participants, or their administrative services providers, the tax or any portion thereof

imposed by Article 4.11A, and from attempting to enforce the provisions, directly or indirectly, of Article 4.11A, including but not limited to the commencement of any administrative or judicial proceedings related to Article 4.11A.

IT IS FURTHER ORDERED that Defendant shall return all tax payments and estimated tax payments made under Article 4.11A to Plaintiffs.

SIGNED AND ENTERED this 7th day of July, 1989.

/s/ James R. Nowlin
JAMES R. NOWLIN
U.S. District Judge

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF TEXAS

AUSTIN DIVISION

LA QUINTA MOTOR INNS, INC.	§	
	§	
VS.	§	CIVIL NO.
	§	A-89-CA-447
RICHARD F. REYNOLDS AS	§	
A MEMBER OF THE TEXAS	§	
STATE BOARD OF	§	
INSURANCE, ET AL.	§	

ORDER

Before the Court is the Motion of Plaintiff La Quinta Motor Inns, Inc. for Summary Judgment, as well as Defendants' response, and Plaintiff's reply. The Court has previously granted summary judgment for Plaintiffs arguing that the Administrative Services Tax Act ("ASTA"), Tex. Ins. Code Ann. art. 4.11A (Vernon Supp. 1988) is preempted by the Employee Retirement Income Security Act ("ERISA"). See Birdsong v. Olson, 708 F. Supp. 792 (W.D. Tex. 1989).

A. Standard of review

Rule 56(c) permits the Court to grant a motion for summary judgment when it appears from the affidavits and other exhibits on file

with the Court that there is no genuine issue of material fact for trial, and when the movant is entitled to summary judgement as a matter of law. FED. R. CIV. P. 56(c). See also Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). In reviewing a motion for summary judgment, the Court must view the evidence in the light most favorable to the party opposing the motion, and indulge all reasonable inferences in that party's favor. Pharo v. Smith, 621 F.2d 656, 664 (5th Cir. 1980).

The Supreme Court's 1986 summary judgment trilogy is by now well-known. In the three cases, the Court set out new rules governing the application of Rule 56. In the first case, Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986), the Court discussed the difference between "material" and "immaterial" issues of fact. The Court stated that a "material" issue is one that could affect the outcome of the suit under the applicable law. Id. at 248. The second case was Celotex Corp. v. Catrett, 477 U.S. 317 (1986). In that case, the Court held that a movant for summary judgment can prevail by showing that its opponent is unable to produce evidence in support of its claim, and that no affidavits or other summary judgment evidence is necessary in such a situation. Id. at 322-24. Finally, in Matsushita Electric Industrial Co. Ltd. v. Zenith Radio Corp., 475 U.S. 574 (1986), the Court held that when a movant produces a prima facie case, the opposing party must come forward with specific facts to show that there

is a genuine issue for trial, or else summary judgment is proper. Id. at 587.

Defendants contend that there are genuine issues of material fact as to whether the health plan is a health and welfare benefit plan as defined by ERISA, and as to the funding of the health plan and how and by whom the contributions are received. Defendants, however, have failed to present any evidence controverting Plaintiff's affidavit, and cannot rest on its pleadings to establish a genuine issue of material fact. Galindo v. Precision American Corp., 754 F.2d 1212, 1216 (5th Cir. 1985). The Court finds that there is no genuine issue as to the following facts.

B. Findings of Fact

La Quinta Employee Health Plan ("the health plan") is sponsored, maintained and contributed to by Plaintiff, La Quinta Motor Inns, Inc., a business engaged in commerce for the purpose of providing health and medical benefits to its employees, including employees in Texas, who are participants in the health plan. As such, the health plan is an employee welfare benefit plan under ERISA. Plaintiff undertakes certain administrative and management functions and obligations in connection with the health plan, and as such is a fiduciary under ERISA. Plaintiff exercises discretionary authority and control over the management of the health plan, in that it has the authority to appoint a plan

administrator and amend or terminate the health plan.

Benefits under the health plan are funded primarily through the contributions of Plaintiff, and in some instances, the health plan's participants. The health plan is self-funded and self-administered. Except for excess stop-loss coverage, the health plan does not purchase insurance for the purposes of providing benefits to its participants or otherwise transfer or spread risk through insurance policies or contracts.

Plaintiff has filed tax returns under protest pursuant to ASTA for 1988 and the first quarter of 1989, and has remitted taxes in the amounts of $50,612.00 and $12,553.00, respectively.

C. Conclusions of Law

Plaintiff fits squarely in the position of the plaintiffs in Birdsong and is entitled to the entry of summary judgment for the reasons set forth in the opinion earlier rendered by this Court. Birdsong v. Olson, 708 F. Supp. 792 (W.D. Tex. 1989). Plaintiff requests the award of reasonable attorneys' fees and costs. The Court will consider any application for attorney's fees and costs which Plaintiff may file, but states no opinion whether assessment of fees and costs is authorized or appropriate in this case.

Plaintiff requests interest on the tax payments to be returned as is allowed by law. Plaintiff does not specify whether it is seeking pre- or postjudgment interest, or both. Plaintiffs in other ASTA cases have contended that they are entitled to an award of prejudgment interest pursuant to 29 U.S.C. §1132(a)(3)(B), which permits fiduciaries, beneficiaries, and participants to bring a civil action to obtain appropriate equitable relief. These plaintiffs acknowledge that ERISA does not expressly address the awarding of interest, but contend that the legislative intent and general principles of equity compel such an award. See Rodgers v. United States, 332 U.S. 371, 373 (1947); see also National Home for Disabled Volunteer Soldiers v. Parrish, 229 U.S. 494 (1913). The Fifth Circuit has held that the award of prejudgment interest in ERISA cases is discretionary with the trial court. Whitfield v. Lindemann, 853 F.2d 1298, 1306 (5th Cir. 1988). The purposes of ERISA are set out in 29 U.S.C. § 1001, and include preserving the financial soundness of employee welfare plans. A common sense reading of the statute leads the Court to conclude that an award of prejudgment interest is warranted when a state has collected taxes contrary to the preemption clause of ERISA. Considerations of fairness should guide the trial court in making its determination. Blau v. Lehman, 368 U.S. 403, 414 (1962). An award is appropriate to compensate for use of the funds. Lindemann, 853 F.2d at 1306. This Court concludes that the State of Texas has enjoyed

the interest-free use of the taxes paid under ASTA. Pursuant to Tex. Tax Code Ann. §112.058(d)(2) (Vernon Supp. 1988), the tax funds may not be placed in a suspense account but shall be immediately deposited.

Other Plaintiffs have requested prejudgment interest be awarded at the rate set forth in 28 U.S.C. § 1961(a):

> at a rate equal to the coupon issue yield equivalent (as determined by the Secretary of the Treasury) of the average accepted auction price for the last auction of fifty-two week United States Treasury bills settled immediately prior to the date of the judgment.

The Court is of the opinion that an award of prejudgment interest is appropriate, but that 28 U.S.C. § 1961(a) is not necessarily the proper method for calculating that interest. The Fifth Circuit in Lindemann suggests that the rate of income received by an ERISA plan in its investments is the appropriate measure for prejudgment interest, 853 F.2d at 1306, and Plaintiffs have presented no evidence regarding this rate. The Court will deny Plaintiffs' request for prejudgment interest at this time, awaiting clarification from Plaintiff as to the type of interest sought, and the appropriate interest rate.

IT IS HEREBY ORDERED that the Motion of Plaintiff La Quinta Motor Inns, Inc. for Summary Judgment is GRANTED;

IT IS FURTHER ORDERED that Plaintiff, La Quinta Motor Inns, Inc. is Granted the following relief:

(a) A declaratory judgment that Article 4.11A is preempted by ERISA, and consequently null and void under the Supremacy Clause of the United States Constitution, to the extent that it imposes a tax on any ERISA-covered employee benefit plan or any such plan's sponsoring employers, fiduciaries, employee participants, or administrative service providers, including La Quinta Motor Inns, Inc.;

(b) A permanent injunction barring Defendants and their agents from seeking, directly or indirectly, to collect, from La Quinta Motor Inns, Inc., the La Quinta Employee Health Plan for which La Quinta serves as a fiduciary and sponsor, La Quinta's employee participants, or it administrative service providers, the tax or any portion thereof imposed by Article 4.11A, and from otherwise attempting to enforce the provisions, directly or indirectly, of Article 4.11A, including but not limited to

the commencement of any administrative or judicial proceedings related to Article 4.11A; and

(c) A permanent injunction ordering the return of all tax payments and estimated tax payments, made by La Quinta Motor Inns, Inc. or the La Quinta Employee Health Plan pursuant to Article 4.11A, to the State Board of Insurance.

SIGNED AND ENTERED this 7th day of July, 1989.

/s/ James R. Nowlin
JAMES R. NOWLIN
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF TEXAS

AUSTIN DIVISION

E-SYSTEMS, INC. GROUP HOSPITAL MEDICAL AND SURGICAL INSURANCE PLAN, ET AL.	§	
VS.	§	CIVIL NO. A-89-CA-148
A. W. POGUE, COMMISSIONER OF (sic)	§	

ORDER

Before the Court is Plaintiff's Motion and Brief in Support of an Award of Prejudgment and Post-Judgment Interest filed August 16, 1989. Upon review of the motion and brief, the responses filed, and the entire file of this case the Court finds said motion has merit and should be Granted.

An award of prejudgment interest in ERISA cases is discretionary with the Court. See Whitfield v. Lindemann, 853 F.2d 1298, 1306 (5th Cir. 1988). Considerations of fairness should guide the trial court in determining whether such relief should be granted. Blau v. Lehman, 368 U.S. 403, 414 (1962). The purposes of ERISA are set out in 29 U.S.C. Section 1001, and include preserving the financial soundness of employee

welfare plans. A common sense reading of the statute leads the Court to conclude that an award of prejudgment interest is warranted when a state has collected taxes contrary to the preemption clause of ERISA. This Court finds that the State of Texas has enjoyed the interest-free use of the taxes paid under ASTA. An award is appropriate to compensate for use of the funds. See Lindemann, 853 F.2d at 1306. While the Court finds an award of prejudgment interest proper, the Court is also of the opinion that 28 U.S.C. Section 1961(a) is not necessarily the most appropriate method for calculating that interest. The Fifth Circuit in Lindemann suggests that the rate of income received by an ERISA plan in its investments is the appropriate measure for prejudgment interest. See Id. Plaintiffs have provided the Court evidence of those investment rates by various affidavits. Upon review of the affidavits, the Court finds an award of prejudgment interest pursuant to those rates would most adequately compensate the Plaintiffs for the use of funds.

ACCORDINGLY, IT IS ORDERED that Plaintiffs' Motion in Support of An Award of Prejudgment and Post-Judgment Interest is GRANTED.

IT IS FURTHER ORDERED that an award of prejudgment interest is appropriate only on the taxes paid directly to the State, and not on taxes paid in interest bearing accounts pursuant to a temporary restraining order entered by the state

court. An award of prejudgment interest is granted as follows:

a. Plaintiffs E-Systems, Inc. Group Hospital Medical and Surgical Insurance Plan, E-Systems, Inc. Group Hospital, Medical, Surgical, Major Medical, Prescription Drug and Weekly Income Disability Benefit Plans, E-Systems, Inc. Group Hospital, Medical, Surgical, Major Medical and Weekly Income Disability Benefit Plan, E-Systems, Inc. Health Care and Weekly Income Disability Plans, E-Systems, Inc. Dental Expense Coverage Plan (a/k/a E-Systems, Inc. Group Dental Plan), E-Systems, Inc. Employee Benefit Trust, First RepublicBank Dallas, National Association, Trustee, with its principal office in Dallas, Dallas County, Texas, are awarded the following prejudgment interest:

Payment Date	Payment Amount	Rate	Prejudgment Interest
March 4, 1988	$ 407,330.00	8.59%	$ 48,031.00

b. US Sprint Group Health Insurance Plan is awarded the following prejudgment interest:

Payment Date	Payment Amount	Rate	Prejudgment Interest
April 28, 1988	$ 24,950.00	9.00%	$ 2,714.99
May 13, 1988	$ 10,535.18	9.00%	$ 1,103.90

c. Kimberly-Clark Corporation Medical Plan, Kimberly-Clark Corporation Dental Plan, Kimberly-Clark Health Benefits Trust, the First National Bank of Neenah, Trustee, a Wisconsin corporation with its principal office in Neenah,

Wisconsin, are awarded the following prejudgment interest:

Payment Date	Payment Amount	Rate	Prejudgment Interest
March 1, 1988	$ 38,453.27	7.725%	$ 4,092.67
May 25, 1988	$ 16,479.97	7.725%	$ 1,434.63

d. Spenco Group Medical Plan is awarded the following prejudgment interest:

Payment Date	Payment Amount	Rate	Prejudgment Interest
March 1, 1988	$ 5,673.06	8.346%	$ 653.34
May 13, 1988	$ 2,431.31	8.346%	$ 236.03

e. Group Life and Health Insurance Plan for Hourly Employees Represented by the American Federation of Grain Millers, The Employee Group Insurance Plan for Pillsbury General Hourly Employees, Steak & Ale Group Benefit Plan for Restaurant Hourly Employees, The Group Insurance Plan for Pillsbury Salaried Employees, The Group Insurance Plan for Burger King Hourly Employees, The Group Insurance Plan for Burger King Salaried Employees, The Pillsbury Group Employees Health Benefit Trust, First Bank (formerly First National Bank of Minneapolis), National Association, Trustee, with its principal office in Minneapolis, Minnesota, are awarded the following prejudgment interest:

Payment Date	Payment Amount	Rate	Prejudgment Interest
March 1, 1988	$ 79,133.00	8.312%	$ 9,075.58
May 13, 1988	$ 33,914.00	8.312%	$ 3,278.89

f. The Greyhound Lines, Inc., Salaried Employees Medical, Dental Benefits Plan ASO-19861-7, Eagle Manufacturing, Inc. Salaried Employees Medical, Dental Benefits Plan ASO-19861-7 (formerly ASO-19827-7 and a/k/a Eagle Manufacturing, Inc. Salaried Employees Medical Benefits Plan), are awarded the following prejudgment interest:

Payment Date	Payment Amount	Rate	Prejudgment Interest
March 1, 1988	$ 13,721.89	11.770%	$ 2,248.17
May 13, 1988	$ 5,880.80	11.770%	$ 808.77

g. Shell Hospital Surgical Medical Program, Shell Hospital Surgical Medical Program Trust, Texas Commerce Bank, National Association, Trustee, are awarded the following prejudgment interest:

Payment Date	Payment Amount	Rate	Prejudgment Interest
March 1, 1988	$ 573,851.68	8.321%	$ 65,890.00
May 13, 1988	$ 245,936.43	8.321%	$ 23,805.00

Shell Dental Assistance Plan, Shell Dental Assistance Plan Trust, Texas Commerce Bank, National Association, Trustee, are awarded the following prejudgment interest:

Payment Date	Payment Amount	Rate	Prejudgment Interest
March 1, 1988	$ 54,425.32	8.331%	$ 6,257.00
May 13, 1988	$ 23,325.14	8.331%	$ 2,261.00

h. Greyhound Lines, Inc. - Amalgamated Council Health and Welfare Plan, Greyhound

Lines, Inc. - Amalgamated Council Health and Welfare Trust, Kevin Bolton, Mike Doyle, Anthony Lannie, Judy Collins, L. L. Petrie, Robert Tancos, Jerry Hatalla, James Cushing-Murray, James W. Norman, Paul Owsley, Ed Strait, and Smith Williamson, Trustees, are awarded the following prejudgment interest:

Payment Date	Payment Amount	Rate	Prejudgment Interest
March 8, 1988	$ 4,168.00	7.262%	$ 410.33
March 9, 1988	$ 3,126.00	7.262%	$ 307.08
May 13, 1988	$ 3,126.00	7.262%	$ 263.71

i. Texas Carpenters Health Benefit Fund, and Texas Carpenters Health Benefit Trust, Harold E. Moore, J. P. Long, Jr., Joe Smith, Herb Kratz, Chip Walker, Ray Hernandez, Wade Andres, and John Stuart, Trustees, are awarded the following prejudgment interest:

Payment Date	Payment Amount	Rate	Prejudgment Interest
March 1, 1988	$ 78,524.88	8.311%	$ 9,005.37
June 1, 1988	$ 33,653.52	8.311%	$ 3,095.84

IT IS FURTHER ORDERED that post-judgment interest shall accrue against all ASTA taxes paid to Defendant by or on behalf of the plans sponsored by Plaintiffs herein, at the rate specified in 28 U.S.C. § 1961(a) from July 8, 1989, said rate being 8.16% until paid by Defendant herein pursuant to this Court's Order.

SIGNED AND ENTERED this 22nd day of June, 1990.

/s/ James R. Nowlin
JAMES R. NOWLIN
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF TEXAS

AUSTIN DIVISION

LA QUINTA MOTOR INNS, INC. ET AL.	§	
VS.	§	CIVIL NO. A-89-CA-447
RICHARD F. REYNOLDS AS A MEMBER OF THE TEXAS STATE BOARD OF INSURANCE, ET AL.	§	

ORDER

Before the Court is Plaintiff's Motion for Prejudgment and Post-Judgment Interest filed August 3, 1989. Upon review of the motion, the response filed, and the entire file of this case the Court finds said motion shows merit and should be GRANTED.

An award of prejudgment interest in ERISA cases is discretionary with the Court. See Whitfield v. Lindemann, 853 F.2d 1298, 1306 (5th Cir. 1988). Considerations of fairness should guide the trial court in determining whether such relief should be granted. Blau v. Lehman, 368 U.S. 403, 414 (1962). The purposes of ERISA are set out in 29 U.S.C. Section 1001, and include

preserving the financial soundness of employee welfare plans. A common sense reading of the statute leads the Court to conclude that an award of prejudgment interest is warranted when a state has collected taxes contrary to the preemption clause of ERISA. This Court finds that the State of Texas has enjoyed the interest-free use of the taxes paid under ASTA. An award is appropriate to compensate for use of the funds. See Lindemann, 853 F.2d at 1306. While the Court finds an award of prejudgment interest proper, the Court is also of the opinion that 28 U.S.C. Section 1961(a) is not necessarily the most appropriate method for calculating that interest. The Fifth Circuit in Lindemann suggests that the rate of income received by an ERISA plan in its investments is the appropriate measure for prejudgment interest. See Id. Plaintiffs have provided the Court evidence of those investment rates by affidavit. Upon review of the affidavit, the Court finds an award of prejudgment interest pursuant to those rates would most adequately compensate the Plaintiffs for the use of funds.

ACCORDINGLY, IT IS ORDERED that Plaintiffs' Motion for Prejudgment and Post-Judgment Interest is GRANTED.

IT IS FURTHER ORDERED that Defendants pay La Quinta Motor Inns, Inc. $ 4,770.93 in prejudgment interest as calculated in Plaintiff's affidavit.

IT IS FURTHER ORDERED that Defendants pay La Quinta postjudgment interest calculated at the rate of 8.16% as set out in 28 US.C. (sic) § 1961(a) on $69,749.00, the total amount of taxes paid by La Quinta Motor Inns, Inc pursuant to Article 4.11A of the Texas Insurance Code, computed from July 17, 1989, the date of final judgment herein.

SIGNED AND ENTERED this 22nd day of June, 1990.

/s/ James R. Nowlin
JAMES R. NOWLIN
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 89-1707, 89-1709
90-8457 and 90-8460

E-SYSTEMS, INC. GROUP HOSPITAL MEDICAL AND SURGICAL INSURANCE PLAN, ET AL.,
Plaintiffs-Appellees,

versus

A. W. POGUE, Commissioner of the Texas State Board of Insurance,
Defendant-Appellant.

LA QUINTA MOTOR INNS, INC.
Plaintiff-Appellee,

versus

RICHARD F. REYNOLDS, As a Member of the Texas State Board of Insurance, ET. AL.,
Defendants-Appellants.

Appeals from the United States District Court
for the Western District of Texas

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC
(Opinion May 1, 5 Cir., 1991, ___ F.2d ___)
(JUNE 10, 1991)

Before BROWN, POLITZ and JOHNSON, Circuit Judges.

PER CURIAM:

(✓) The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular service on the Court having requested that the Court be polled on rehearing en banc, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is DENIED.

( ) The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:
/s/Henry A. Politz
United States Circuit Judge

No. 91-428

IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

PHILIP W. BARNES, COMMISSIONER OF TEXAS STATE BOARD OF INSURANCE, *et al.*,
Petitioners,

v.

E-SYSTEMS, INC. GROUP HOSPITAL MEDICAL & SURGICAL INSURANCE PLAN, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

BRIEF FOR RESPONDENTS IN OPPOSITION

MARK L. EVANS
Counsel of Record
ALAN I. HOROWITZ
MILLER & CHEVALIER, Chartered
655 Fifteenth Street, N.W.
Washington, D.C. 20005
(202) 626-5800
Counsel for Respondents

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTIONS PRESENTED

1. Whether a Texas tax—which concededly "relates to" employee benefit plans within the meaning of ERISA's preemption provision, and which petitioner no longer defends as applied to respondents—would be valid if applied to other kinds of plans.

2. Whether for purposes of the Tax Injunction Act, and contrary to rulings by both state and federal courts, respondents have a "plain, speedy and efficient remedy" in Texas state court for challenging the tax.

3. Whether the Eleventh Amendment prevents a federal court from ordering restitution of state taxes collected in violation of federal law, where the federal statute expressly makes a state answerable in federal court for equitable remedies for such unlawful state taxes and where there is no adequate refund remedy in state court.

4. Whether the district court abused its discretion in awarding pre-judgment interest.

RULE 29.1 STATEMENT

A list of respondents' parent companies and subsidiaries (except wholly owned subsidiaries) is set forth at Appendix C, *infra*, 10a-12a.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

No. 91-428

PHILIP W. BARNES, COMMISSIONER OF TEXAS STATE BOARD OF INSURANCE, *et al.*,

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

BRIEF FOR RESPONDENTS IN OPPOSITION

STATEMENT

Respondents are a group of "self-insured" benefit plans that provide medical, dental, hospital, accident, death, and disability benefits for employees in the State of Texas. Each plan qualifies as an "employee welfare benefit plan" within the meaning of Section 3(1) of the Employee Retirement Income Security Act of 1974 (ERISA), as amended, 29 U.S.C. § 1002(1). This case arises out of respondents' challenge to the Texas Administrative Services Tax Act (ASTA), Tex. Ins. Code Ann. art. 4.11A (Vernon Supp. 1987-1988) (reprinted in pertinent part in Appendix A, *infra*, 6a), on the ground that it is preempted by ERISA.

1. *The Tax.*

ASTA, which went into effect on September 1, 1987, imposes a tax on the administration of benefit plans that is measured by the amount of benefits paid. In two parallel sections, the statute provides that each "insurance carrier" (sec. 1) or "person" (sec. 2) "receiving any form of administrative or service fee . . . for performing or providing any service . . . relating to any . . . benefit plan . . . shall pay . . . an annual tax on the gross amount of administrative or service fees received." App., *infra*, 1a-3a.

The tax base—"gross amount of administrative or service fees"—is defined much more expansively than its language would suggest. The term includes not only the "gross amount of all consideration . . . received by the carrier or other person," but also "the total amount of all claims and benefits paid" under the plan. Sec. 3(2); App., *infra*, 3a-4a. The statute explicitly imposes the tax on benefit plans, providing that, where an insurance carrier or other person does not receive any fees, "there is imposed on each plan . . . an annual tax equal to 2.5 percent of the gross amount of administrative or service fees and that plan shall pay the tax to the State." Sec. 4(c); App., *infra*, 5a.

2. *The Proceedings Below.*

The convoluted procedural history of this case both complicates the issues before the Court and sharply reduces their significance beyond the scope of this particular dispute.

a. Under the threat of substantial penalties, respondents paid under protest to the Texas authorities the tax imposed by ASTA on the amount of benefits paid out by the plans, as required by section 4(c) of that Act. Thereafter, in May 1988, they brought suit in the Texas District Court of Travis County, seeking injunctive relief

against the collection of the ASTA tax and a refund of amounts already paid.[1] Respondents argued that ASTA "relate[s] to" an ERISA plan (both because it computes a tax on the basis of benefits paid out by an ERISA plan and because it imposes that tax on the plan or its fiduciaries), and that the tax is therefore preempted under section 514(a) of ERISA, 29 U.S.C. § 1144(a).

b. Two months earlier, groups of participants, trustees, and sponsoring employers of other plans—but not, as in the present case, the plans themselves—had commenced several different suits in the United States District Court for the Western District of Texas, challenging ASTA on similar grounds. Those suits ultimately were consolidated in the district court and decided under the caption of *Birdsong v. Olson*. The plaintiffs in one of the pre-consolidation cases, *American Airlines, Inc. v. Lee*, sought to deposit their tax payments into the registry of the court. They maintained both that there was no refund remedy in state court for ASTA taxes and that only the plans themselves, not the sponsoring employers, qualified as "taxpayers" with standing to invoke Texas tax remedies. *See* Pet. App. 38a. The State responded that there was a refund remedy and that the employers, not the plans, were the taxpayers. It cited for this proposition a Texas regulation that makes the person "who first collects . . . the contribution . . . primarily responsible for the tax." April 29, 1988, State of Texas' Response at 4-6, citing Tex. Admin. Code § 7.1704(a).[2]

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[1] Respondent LaQuinta did not file an action in state court. In federal court, it filed suit separately from the other respondents, and the two cases were consolidated on appeal. For convenience, we will use the term "respondents" generally, without qualification for the differences in LaQuinta's status. We also note that respondents Texas Carpenters Health Benefit Fund and Texas Carpenters Health Benefit Trust are not parties to this filing but are separately represented by other counsel.

[2] For the convenience of the Court, we are lodging with the Clerk copies of the pertinent portions of the State's response and of the other record materials cited in this brief that are not reprinted in the appendices.

c. The State's assertion in the *American Airlines* case —that the plans themselves were not the "taxpayers"— cast doubt on the ability of respondents to obtain relief in state court. Relying on essentially the same arguments made by the federal court plaintiffs, respondents filed a motion asking the Texas district court to allow respondents to deposit future tax payments into the court. The State opposed the motion, but did not concede that respondents had an adequate state court remedy.

The Texas district court agreed with respondents that they had no adequate refund remedy in Texas court. In September 1988, it granted a temporary injunction, allowing respondents to pay the ASTA tax into the registry of the court as it came due. App. B, *infra*, 7a-9a. The court explained that, if the State were to collect the tax, it would "alter the status quo and tend to make ineffectual a judgment in favor of Plaintiffs, in that (1) Defendants refuse to recognize Plaintiffs' standing to protest and obtain a refund as taxpayers and (2) the taxes paid under Article 4.11A are not subject to a statutory refund procedure or any legislative appropriation for refund judgments and that . . . Plaintiffs will be without any adequate remedy at law in that Plaintiffs will be without means to recover the taxes." *Id.* at 8a. The State took an interlocutory appeal from this order, but that appeal was stayed pending further developments in the federal court.[3]

d. In the *Birdsong* litigation, the federal district court similarly concluded that the plaintiffs had no "plain, speedy and efficient" remedy in state court within the meaning of the Tax Injunction Act, 28 U.S.C. § 1341. In November 1988, in an unreported decision, it accordingly denied the State's motion to dismiss the suits on Tax

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[3] Contrary to the State's assertion (Pet. 11, 26-27), the Texas district court did not reach the merits and did not hold that ASTA is preempted by ERISA. It merely authorized respondents to pay the tax into the court as it came due, rather than into the State treasury.

Injunction Act and Eleventh Amendment grounds. Pet. App. 29a-47a. The court gave several reasons for its conclusion (*id.* at 40a): (1) ERISA preemption prevents the state courts from declaring that ASTA violates ERISA; (2) "Plaintiffs, to the extent they are considered nontaxpayers or nontaxable, lack standing to file a tax protest suit under ASTA section 9 or seek injunctive relief under section 112.101 of the Tax Code"; (3) it is "speculative" whether the plaintiffs could secure special legislative consent to sue for a refund; and (4) "Plaintiffs have demonstrated through the inconsistent positions taken" by the State in the Texas and federal proceedings (see pp. 10-11, *infra*) "that it is unlikely that a refund could be obtained even if suit were allowed." The court added that, in any event, there was "a sufficient amount of uncertainty concerning each of the state remedies described above as to make them speculative." Pet. App. 40a. With respect to the Eleventh Amendment, the court concluded that ERISA had abrogated the State's immunity in the limited context of a "claim for restitution of taxes paid pursuant to ASTA." *Id.* at 45a.

Subsequently, in February 1989, the court granted the *Birdsong* plaintiffs' motion for summary judgment. *Birdsong v. Olson*, 708 F. Supp. 792 (W.D. Tex. 1989). Relying heavily on *General Motors Corp. v. California Board of Equalization*, 815 F.2d 1305 (9th Cir. 1987), *cert. denied*, 485 U.S. 941 (1988), the court concluded that ASTA "imposes a tax that clearly relates to ERISA-covered employee welfare benefit plans, and that the tax is preempted by ERISA." 708 F. Supp. at 801. The court declared ASTA invalid, enjoined the State from making further efforts to collect the tax from the plaintiffs, and ordered the return of tax payments already made. The State appealed, but the court of appeals dismissed the appeal for lack of jurisdiction because the notice of appeal was untimely filed. *Birdsong v. Wrotenbery*, 901 F.2d 1270 (5th Cir. 1990).

e. In the wake of the district court's ruling in *Birdsong*, respondents (with LaQuinta filing separately) brought the instant cases in the federal district court. Relying on its earlier decisions in *Birdsong*, the court denied the State's motions to dismiss for lack of jurisdiction (Pet. App. 26a; 27a-28a) and granted summary judgment in favor of respondents (*id.* at 48a-54a; 55a-62a). The court enjoined the State from enforcing the tax against respondents and ordered the return of the more than $1.7 million in taxes already paid. *Id.* at 53a-54a; 61a-62a; *see id.* at 51a; 58a. Thereafter, the court granted respondents' motions for pre-judgment and post-judgment interest. *Id.* at 63a-69a; 70a-72a.

f. After dismissal of the appeal in *Birdsong*, the court of appeals heard this case and affirmed. Pet. App. 1a-13a. The court stated that ERISA preempts a state court action by a taxpayer to challenge a state tax as preempted by ERISA; accordingly, the Tax Injunction Act is inapplicable because respondents have no effective remedy in state court. Pet. App. 6a. On the merits, the court concluded that "it is apparent that ASTA 'relates to'" ERISA plans—both because it is calculated on the basis of benefits paid and because it will directly affect the relationships among the employer, the plan, the plan fiduciaries, and the beneficiaries. *Id.* at 8a-9a. In a separate concurring opinion, Judge Brown elaborated on the Tax Injunction Act issue, explaining that Texas Supreme Court decisions leave no room for an adequate state remedy. *Id.* at 11a-13a. The court separately affirmed the interest award. *Id.* at 14a-16a.

The court of appeals denied rehearing but granted the State's request for a 30-day stay of the mandate, pending the filing of a certiorari petition. *See* Fed. R. App. P. 41(b). The court subsequently denied the State's request to extend that 30-day period. Thereafter, on July 29, 1991, the State applied to the Circuit Justice for a further stay of the court of appeals' judgment. On August

2, 1991, without hearing from respondents on the stay application, Justice Scalia ordered the judgment below stayed pending the filing of a certiorari petition and ultimate resolution of the case. Pet. App. 17a-25a.

ARGUMENT

In its petition, the State of Texas challenges both the jurisdiction of the federal courts to entertain this suit (either for injunctive or monetary relief) and the merits of the court's ruling that ASTA violates federal law. This case is an inapt vehicle for resolving the issues presented by the petition. First, the State has abandoned its defense of ASTA as applied to these respondents, essentially ending the underlying controversy between the parties on the merits. Second, regardless of how the federal issues may be resolved, the jurisdictional holding below is supported by grounds unique to Texas law. Before this Court can reach the questions presented in the petition, it will have to consider detailed questions of state procedure—and disagree with the answers already given to those questions by both the state and federal courts. Third, nothing in the court of appeals' decision conflicts with any decision of another court of appeals or of this Court, and there is consequently no reason for further review.

1. *Resolving the Jurisdictional Questions Presented in the Petition Will Not Affect the Ultimate Resolution of the Dispute Between the Parties.*

Respondents brought this action to resolve a major tax controversy with the State of Texas—whether ERISA prohibits the State's efforts to tax them under ASTA. Throughout this litigation, the State has repeatedly and vigorously defended the validity of its tax in full, albeit without success in any forum. In this Court, however, the State has changed its tune and essentially abandoned its defense of the statute on the merits *as applied to these plans*. As a result, the basic controversy between the

parties that lies at the heart of this litigation no longer exists. Regardless of the resolution of the jurisdictional questions presented in the petition, the parties now agree that the ultimate result should be to excuse respondents from paying the ASTA tax and to refund the tax they have already paid under that statute. This Court should not exercise its certiorari jurisdiction to resolve procedural questions that will not affect the ultimate outcome of the case.

Texas now acknowledges that ASTA is invalid, at least in part, phrasing the question for this Court as "whether *any part* of ASTA represents a valid exercise of state authority." Pet. 35 (emphasis added); *see also* Pet. i. The State "concede[s] . . . that ASTA relates to ERISA" (Pet. 35) and therefore falls within ERISA's preemptive scope as a state statute that "relate[s] to" a covered employee benefit plan. Section 514(a). Invoking ERISA's "insurance exception" (section 514(b)(2)), however, the State argues that "third party administrators can be considered part of the insurance business for purposes of state regulation" (Pet. 37) and that these administrators "are often licensed insurance companies" (Pet. 36).

These partial defenses have never been raised before in this litigation; indeed, they mark a complete reversal of the State's prior position. In the court of appeals, the main subsection of the State's brief defending the statute was titled "ASTA does not relate to ERISA" (C.A. Br. 38)—a position the state now expressly repudiates.[4] And the State argued that ERISA's insurance savings clause

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[4] As noted above, the *Birdsong* case was briefed in the court of appeals but was ultimately dismissed because the notice of appeal was untimely. The parties then agreed to adopt the appellate briefs in *Birdsong* as their main briefs in this litigation; each side also filed a short supplemental brief. "C.A. Br." refers to the briefs filed in the *Birdsong* case in the court of appeals and adopted by the parties for this case. "Supp. Br." refers to the supplemental briefs filed in the court of appeals in this case.

justified taxation of "first party administrators." *Id.* at 41-42. Even if the State's new arguments had merit, which they do not, it would be inappropriate for this Court to entertain them in the first instance. *See, e.g., United States v. Lovasco*, 431 U.S. 783, 788 n.7 (1977).

More importantly, these new arguments have no apparent applicability to respondents, who are neither third-party administrators nor insurance companies. The State thus seeks to litigate in this Court abstract issues not presented in this case—which accordingly can provide no basis for altering the final outcome. In sum, the State's about-face on the validity of ASTA has eliminated the underlying controversy between the parties to this litigation.

2. The Tax Injunction Act Is Inapplicable Because, as Both the State and Federal Courts Concluded, Texas Procedures Do Not Provide a Plain, Speedy, and Efficient Remedy for Unlawful Taxation Under ASTA.

The State presents the question whether "ERISA preempt[s] a State's general tax remedies, thereby . . . making the Tax Injunction Act 'inapplicable.'" Pet. i. This description implies that the jurisdictional issues in this case turn entirely on a construction of ERISA. But in fact the Tax Injunction Act dispute has always centered on the procedural details of Texas tax law, not on any contested construction of federal law. Despite an ever-changing panoply of interpretations of Texas law proffered by the State, both the federal district court (Pet. App. 40a) and the state district court of Travis County (App., *infra*, 8a) concluded that Texas law does not provide respondents with a plain, speedy, and efficient remedy in state court; therefore, by its terms the Tax Injunction Act does not bar this action. Unless this Court disagrees with that conclusion regarding Texas law, it has no basis for reversing the judgment of the court of appeals on the Tax Injunction Act issue.

The history of this litigation illustrates the uncertainty of an adequate remedy in the Texas courts. As we have noted (p. 3, *supra*), early in this litigation the *American Airlines* plaintiffs asked the federal district court to permit them to pay their tax into court. Pointing to the absence of any specific appropriation or refund provision, the plaintiffs argued that it was uncertain whether Texas law would permit ASTA taxes to be refunded if they paid the tax in the normal course. The State disagreed. Relying on the affidavit of an official of the state Comptroller's Office, T.R. Mallett, the State argued that ASTA refunds were authorized by Tex. Gov't Code § 403.076. *See* April 29, 1988, State of Texas' Response, at 16. That statute clearly provided refund authority for many kinds of taxes listed there but did not include ASTA in the list.[5] The federal court accepted the State's representation as demonstrating that plaintiffs would not suffer irreparable injury if they paid the tax to the State, and the court therefore denied the requested relief. May 13, 1988, Order, at 6.

When the scene shifted to state court, however, the Travis County district court concluded that Texas law did *not* provide a refund remedy. The State there had opposed respondents' motion to allow them to deposit their tax payments into court, putting on Mr. Mallett to testify that Texas law afforded a refund remedy for ASTA overpayments. This time, however, Mr. Mallett testified, contrary to the State's position in federal court, that section

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[5] Although since amended, section 403.076(a) provided at that time:

> The comptroller shall pay from available funds claims for refunds of taxes collected under:
>
> (1) The Alcoholic Beverage Code;
>
> (2) Sections 11 and 12, Article 1.14-1; Section 12, Article 1.14-2; and Articles 4.10 and 4.11, Insurance Code; and
>
> (3) Section 1, Chapter 619, Acts of the 51st Legislature, Regular Session, 1949 (Article 4769, Vernon's Texas Civil Statutes).

403.076 does *not* provide authority to refund ASTA tax payments (Sept. 12, 1988, Hearing Tr. 156). He also acknowledged that section 29 of the General Appropriations Act (70th Leg., 2d C.S. Ch. 78, Art. V, Sec. 29, 1987 Tex. Gen. Laws 253, 846) does not permit disbursement of state funds without a specific provision authorizing a refund (Tr. 152). Mr. Mallett maintained, however, that Tex. Gov't Code § 403.077 provides refund authority for any unlawful tax, including ASTA (Tr. 157-158, 164, 168).

The state court disagreed with the State's new theory. The court concluded that "the taxes paid under Article 4.11A are not subject to a statutory refund procedure or any legislative appropriation for refund judgments and that unless Defendants are deterred from [collecting the tax], Plaintiffs will be without any adequate remedy at law in that Plaintiffs will be without means to recover the taxes paid pursuant to Article 4.11A." App., *infra*, 8a.

In the wake of these developments, the federal district court reconsidered its prior analysis of the state procedures when called upon to rule on the State's motion to dismiss the *Birdsong* litigation. The court remarked that it had expressly relied on Mr. Mallett's affidavit and the State's representations with respect to section 403.076 (Pet. App. 38a); "[n]ow that the State has abandoned section 403.076 as a basis for a refund," the court proceeded to consider the State's new contention that ASTA refund authority resides in section 403.077 (Pet. App. 39a). That section authorizes a refund of money collected "through mistake of fact or law," but it has been authoritatively construed by the Texas Supreme Court *not* to apply to a legislative enactment of an unlawful tax. *See, e.g., Bullock v. Hewlett-Packard Co.*, 628 S.W.2d 754, 757 (1982). Accordingly, the federal district court agreed with the state court that section

403.077 does not provide a remedy. For that and other reasons, it concluded that the plaintiffs had no "plain, speedy, and efficient" refund remedy in state court and therefore that the Tax Injunction Act was not a bar to federal jurisdiction.

Although the court of appeals did not discuss these defects in state procedures as they relate to ASTA, they remain obstacles to the State's attempt to invoke the Tax Injunction Act. The State has never adequately responded to the decisions of the federal and state district courts on this point. In its brief in the court of appeals, the State renewed its reliance on section 403.077 (ignoring the case law on which the district court based its rejection of the contention), and it argued that section 29 of the General Appropriations Act alone confers a right to a refund—an assertion that directly contradicts Mr. Mallett's testimony. C.A. Br. 29-30. *See also* Pet. 28 n.9. It also raised a new argument—that section 112.060, which directs the treasurer how to make refunds, is "self appropriating," even though Texas case law requires a more specific appropriation for the payment of the judgment. C.A. Br. 28-29; *see Norris v. Bullock*, 580 S.W.2d 812, 813-814 (Tex. 1979); *Jessen Associates, Inc. v. Bullock*, 531 S.W.2d 593, 599 (Tex. 1975). In addition, the State argued that the plaintiffs could seek a special resolution from the Texas legislature allowing them to bring suit (C.A. Br. 23), but that route clearly is too speculative to satisfy the standard of the Tax Injunction Act. In this Court, the State adds nothing, except to assert that its "general tax remedies are intended, and must be construed, to give real relief to aggrieved tax litigants." Pet. 28.

Not only is there uncertainty over the existence of a state court remedy, but there is also a question concerning respondents' standing to invoke whatever state remedy does exist. The State repeatedly asserted in the *Birdsong* litigation that the employers are the "taxpay-

ers" who can invoke Texas procedures; the State has argued that ERISA plans are not ASTA taxpayers, despite the plain language of section 4(c). *See* C.A. Br. 12. The district court concluded that the Tax Injunction Act is no bar to federal jurisdiction here because "non-taxpayers" are "unable to file a protest suit under ASTA section 9(a) or seek injunctive relief under section 112.101 of the Tax Code." Pet. App. 36a. There is no reason for this Court to disturb that conclusion.

The State's position on the standing question, like its positions on the merits and on the source of a refund remedy, has undergone a striking transformation. In the court of appeals, the State initially maintained that sponsoring employers, not the plans themselves, are the proper taxpayers under ASTA, and it flatly asserted that plaintiffs who "are not taxpayers . . . cannot maintain an action in state court." C.A. Br. 32. In its supplemental brief below, the State began to qualify its position. It reiterated that "[t]he protest [refund] remedy is available to 'a person who is required to pay' the tax," but it suggested that the Texas courts have not been "especially stringent" in enforcing that limitation. Supp. Br. 4-5.[6] In this Court, the State for the first time takes the opposite position (Pet. 27-28): "Under Texas law the 'taxpayer,' for purposes of maintaining a tax protest suit, is the person who paid the tax rather than the person who should have paid." These shifting positions surely give no assurance that respondents have a plain remedy in state court.[7]

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[6] The State relied for that proposition on a case where a court rejected the State's effort to have a refund suit dismissed on the ground that the plaintiff mistakenly had sued in the name of his corporation, rather than in his own name. *See* Supp. Br. 4-5.

[7] The State has shown consistency in its lack of sympathy for respondents' difficult situation under Texas procedures. To the extent the State's position that they are not ASTA "taxpayers" leaves respondents without a state remedy, the State has viewed that

In sum, the state district court of Travis County has ruled that respondents do not have a certain refund remedy in the Texas courts. And, although the State has altered its position several times, it has never advanced a convincing theory for the availability of a refund in state court. Moreover, the State has repeatedly cast doubt upon the standing of respondents to seek relief under Texas law. In these circumstances, the district court correctly concluded that respondents' ability to obtain a refund in state court is, at best, "uncertain[]" and "speculative." Pet. App. 40a. That kind of remedy "is not adequate to bar federal jurisdiction." *Franchise Tax Board v. Alcan Aluminium Ltd.*, 110 S. Ct. 661, 667 (1990).

3. *Prudential Considerations Counsel Against Further Prolonging This Litigation.*

Even if the existence of a state remedy were more certain, it would not be appropriate for this Court to exercise its certiorari jurisdiction for the purpose of sending this litigation back to state court at this late date. Respondents have been taken on a tour of the federal and state court systems while the State has experimented with different theories on jurisdiction and the merits to try to rescue a patently unlawful

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result as respondents' own fault for paying taxes that assertedly were owed by the employer. At the hearing before the Texas district court, the State argued that respondents could not bring a refund suit, explaining: "[I]f the plaintiffs are paying the tax on behalf of someone else, they have recourse against the person for whom they paid the tax. And their recourse is there, not against the State of Texas." Sept. 12, 1988, Hearing Tr. 53. In this Court, the State still clings to its contention that respondents created their own problems by following the command of section 4(c) that the plans must pay the tax (Pet. 30): "[T]he confusion fostered by persons paying taxes which they clearly do not owe cannot be used to subvert the availability of tax remedies which exist as a matter of law." Indeed, the State's current view is that, because respondents should have ignored the statutory requirement that they pay the tax, any damages they suffered were "incurred voluntarily" and "self-inflicted." Pet. 41, 42.

tax. Now that it has lost the case on the merits, the State essentially concedes that the tax is unlawful as to respondents, but it asks this Court to force them to start over again in state court to get their remedy.

Respondents do not care (and never have cared) whether the relief to which they are entitled is ordered by a federal or a state court. At this point, their interest in defending the jurisdictional holding below is simply to put an end to this wasteful litigation and the State's efforts to subject them to an invalid tax. In its petition (at 18 n.5), the State explains what appears to be its fiscal interest in sending this case back to state court—to avoid paying refunds to taxpayers who did not adequately protect themselves by protesting the tax at the time of payment. The State's desire to retain as a windfall a portion of the invalid ASTA taxes already collected—*from other taxpayers*—is not an adequate justification for exercising this Court's discretionary jurisdiction and prolonging this litigation.

4. ***The Federal Courts Have Exclusive Jurisdiction Over an Action Challenging the Validity of a State Tax Under ERISA.***

a. Even apart from these prudential considerations, there is no cause for review by this Court because the court of appeals' resolution of the questions presented in the petition does not conflict with established law. Section 502(a)(3) of ERISA, 29 U.S.C. § 1132(a)(3), authorizes any fiduciary to bring a civil action "to enjoin any act or practice which violates any provision of this title." Section 502(e)(1), 29 U.S.C. § 1132(e)(1), provides that such suits fall within the "exclusive jurisdiction" of the federal district courts. The recognized preemptive effect of these ERISA provisions amply supports the court of appeals' conclusion that the Tax Injunction Act is no bar to respondents' lawsuit.

This Court has made clear that "ERISA's civil enforcement remedies were intended to be exclusive" and

therefore preempt state laws that otherwise might provide a concurrent cause of action. *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 54 (1987). "Congress clearly expressed an intent that the civil enforcement provisions of ERISA § 502(a) be the exclusive vehicle . . . and that varying state causes of action for claims within the scope of § 502(a) would pose an obstacle to the purposes and objectives of Congress." *Id.* at 52. Thus, when an enforcement action is available under section 502(a) of ERISA, "the federal remedy provided by that provision displace[s] state causes of action." *Id.* at 57.

Although the Court in *Pilot Life* was specifically addressing an ERISA action brought under section 502(a)(1) by beneficiaries alleging improper processing of benefit claims, the preemption of state causes of action applies equally to other civil enforcement actions under section 502(a). In *Ingersoll-Rand Co. v. McClendon*, 111 S. Ct. 478, 485 (1990), the Court reaffirmed the general proposition that "Congress intended § 502(a) to be the exclusive remedy for rights guaranteed under ERISA." Expanding upon *Pilot Life*, the Court remarked that "there is no basis in § 502(a)'s language for limiting ERISA actions to only those which seek 'pension benefits.'" *Id.* at 486. Because "the Texas cause of action [for wrongful termination based on tort and contract theories] purport[ed] to provide a remedy for the violation of a right expressly guaranteed by [ERISA] and exclusively enforced by § 502(a)," it was preempted by federal law. *Id.*

These principles strongly suggest that respondents cannot bring an action under state law to invalidate the ASTA tax. The terms of section 502(a)(3) encompass a suit to enjoin the collection of a tax that contravenes ERISA's protection of benefit plans (and to obtain other appropriate equitable relief). The act of collecting the tax would violate the ERISA provision superseding state laws that "relate to any employee benefit plan," includ-

ing "any State tax law relating to employee benefit plans." Section 514(a), (b)(5)(B)(i). Indeed, this Court has recognized that section 502(a)(3) empowers a plan to sue state tax authorities to enjoin actions that interfere with the plan's federal rights (subject to possible limitations of the Tax Injunction Act). *See Franchise Tax Board v. Construction Laborers Vacation Trust*, 463 U.S. 1, 19-20 & nn. 20-21 (1983).

If the action to invalidate the ASTA tax can be brought under section 502(a)(3), any parallel state cause of action should be preempted. And because jurisdiction over the ERISA cause of action lies exclusively in federal court, respondents would have no remedy that they can pursue in state court. Accordingly, the federal court action is not barred by the Tax Injunction Act; by its terms, the Act does not apply if there is no plain, speedy, and efficient remedy in state court.

As Judge Brown explained in his concurring opinion below, the Texas courts have provided additional guidance on whether they would entertain a claim by respondents that the ASTA tax is invalid under ERISA. The Texas Supreme Court has ruled that, where a claim falls within the exclusive jurisdiction provision of ERISA, "a successful assertion of ERISA preemption would deprive state courts of subject-matter jurisdiction to hear the claim." *Gorman v. Life Ins. Co. of North America*, 811 S.W.2d 542, 547 (Tex. 1991), *cert. denied*, No. 90-1984 (Oct. 7, 1991). The *Gorman* rule is fully applicable where the claim is brought under the rubric of state law; a state claim "that relates to the administration of an ERISA plan falls within the exclusive jurisdiction of the federal courts, and state courts therefore may not hear such claims." *Id.*

The effect of this jurisdictional holding is to deny respondents a remedy in state court. If they commence an action in state court arguing that ASTA is preempted by ERISA, and if the Texas court agrees

with that assertion, the Texas court appears bound under *Gorman* to bow to ERISA's exclusive jurisdiction provision and to dismiss the case for lack of subject matter jurisdiction in state court. If so, the plaintiffs cannot get relief in state court, and the Tax Injunction Act does not bar them from suing in federal court. *See* Pet. App. 11a-13a (Brown, J., concurring).

It is no answer for the State to argue that "state court decisions do not conclusively decide questions of federal jurisdiction" (Pet. 26). Even if *Gorman* were incorrect, it would still stand as an obstacle to relief in the state courts. Once the Texas courts have held that they cannot afford relief upon a claim founded in ERISA, a claimant should not be forced to litigate through the state system in the hope of reversing that holding. That course of action provides no certain remedy—and manifestly no "speedy or efficient" remedy; accordingly, the Tax Injunction Act does not require it.

Relying on *Franchise Tax Board v. Construction Laborers Vacation Trust*, *supra*, the State argues that ERISA preemption in general, and *Gorman* in particular, do not apply here because this is a tax case (Pet. 24, 26). This argument misapprehends the issue in *Franchise Tax Board*. The Court there held that an action brought *by the State* to enforce its tax levies was not preempted by ERISA. The Court explained that "[s]ection 502(a) specifies which persons—participants, beneficiaries, fiduciaries, or the Secretary of Labor—may bring actions for particular kinds of relief. It neither creates nor expressly denies any cause of action in favor of state governments . . . ." 463 U.S. at 25. Therefore, "a suit by state tax authorities . . . does not 'arise under' ERISA." *Id.* The State's "well-pleaded complaint" provided a basis for relief unrelated to ERISA, and therefore its action was not preempted by ERISA. *Id.* at 26.

The critical fact in *Franchise Tax Board*—absent here—is that the suit was brought by the State. Therefore,

the suit was not of a sort that could have been brought under section 502(a), nor did it raise an ERISA claim as part of the affirmative case. By contrast, any state refund or injunction suit brought by respondents to challenge ASTA would raise a claim founded entirely on ERISA that could have been brought under section 502(a). Nothing in *Franchise Tax Board* implies that ERISA would not preempt such a suit by respondents if brought under Texas law. And, by the same token, the decision below does not hold that ERISA would preempt an action in state court brought by the State of Texas to enforce ASTA. The two cases are entirely consistent.

b. For similar reasons, the State errs in arguing (Pet. 21, 32) that the decision below conflicts with *Ashton v. Cory*, 780 F.2d 816 (9th Cir. 1986). In *Ashton*, the State argued that the Tax Injunction Act prohibited a benefit plan from bringing an action in federal court to declare a state tax invalid as violative of ERISA. Following this Court's direction in *Franchise Tax Board* (*see* 463 U.S. at 20 n.21), the court first inquired whether the plan had a speedy and efficient remedy in state court. 780 F.2d at 818-819. The court concluded that such a remedy existed because the plan had the opportunty to challenge the tax in its capacity as *defendant* in a pending state court action brought by the State to enforce its tax levies. *Id.* at 819.

The court in *Ashton* characterized the "pending state proceedings" brought by the State as the "critical" factor in its decision. *Id.* As here, the plan could not itself sue for a refund in state court, but the court held that the pending suit brought by the state afforded an adequate remedy. That the taxpayer's "remedy is defensive rather than offensive does not undermine its adequacy for purposes of the Tax Injunction Act." *Id.* at 820. The *Ashton* court took pains to emphasize, however, that the Tax Injunction Act requirement was satisfied only because

"the Board ha[d] already instituted collection proceedings for unpaid taxes . . . and the action [was] currently pending" in state court. *Id.* Where "no collection action had yet been filed in state court," it would be "specula[ive] whether state proceedings might be brought," and the possibility of a state collection suit would not provide a plain remedy under the Act. *Id.*

Having concluded that the terms of the Tax Injunction Act barred the plan's federal declaratory judgment action, the *Ashton* court proceeded to the second step of the inquiry delineated by this Court in *Franchise Tax Board* —whether Congress intended section 502 of ERISA to be an exception to the Tax Injunction Act. The court ruled that Congress did not so intend, and therefore it ordered the federal case dismissed for lack of jurisdiction.

The holding below is fully consistent with *Ashton*. This case turns on the first part of the two-pronged inquiry—whether respondents have a speedy and efficient remedy in state court. Like the plaintiff in *Ashton*, respondents cannot sue in state court to invalidate the tax. In contrast to *Ashton*, however, respondents are not defendants in a pending state proceeding in which they have the opportunity to challenge ASTA from a defensive posture. Accordingly, they have no speedy and efficient state remedy. That is the end of the matter. The Tax Injunction Act is inapplicable by its terms, and therefore this case does not present the question left open in *Franchise Tax Board* and decided in *Ashton*—namely, whether ERISA is an exception to the Tax Injunction Act. There is simply no conflict between the decision below and *Ashton*; the difference in result is attributable to the "critical" (780 F.2d at 819) factual difference concerning the pendency of a state enforcement action brought by the State.

5. *ERISA Expressly Abrogates the States' Eleventh Amendment Immunity.*

The State argues that certiorari is appropriate here because the court of appeals' failure to discuss the Eleventh Amendment constitutes "a radical and insupportable departure from constitutional jurisprudence and from this Court's clear and consistent precedents." Pet. 19. This argument is misconceived for two reasons.

First, even if the State's premise were correct, it would not justify review by this Court. If a lower court reaches a result that is incompatible with "this Court's clear and consistent precedents," and if the opinion offers no supporting discussion, there is little reason to anticipate that the decision will be followed by other courts. Although such a decision affects the parties to the litigation, it has only limited legal significance. To review that kind of decision would depart from the Court's usual certiorari standards in favor of a mere error-correcting function. *See Ross v. Moffitt*, 417 U.S. 600, 616-617 (1974). Plenary review of a case merely to correct an error by the court below, as opposed to providing needed guidance to the lower courts, may be appropriate in some instances, but not in this unusual case, where review of the questions presented will not affect the ultimate resolution of the dispute between the parties. *See* pp. 7-9, *supra*.

Second, the State's premise is in any event incorrect. The decision of the court of appeals on these facts does not mark a "radical and insupportable departure" from Eleventh Amendment jurisprudence.

a. The district court held in its unreported decision in *Birdsong* (Pet. App. 43a-45a) that the structure and text of ERISA contemplate subjecting the states to suits in federal court like the one in this case. Section 502(a)(3) authorizes plan fiduciaries to sue to enforce their rights, and section 502(e)(1) establishes the federal courts as the exclusive forum for such suits. Those rights explicitly include the right to be free from "any State

tax law relating to employee benefit plans." Section 514(b)(5)(B)(i). The State is the only logical defendant in an action to enforce this latter right; the statutory text therefore expressly reflects a Congressional determination that the States could be brought into federal court to defend their taxes against the charge that they violate ERISA. And the statute explicitly provides that the court is empowered to grant injunctive relief and "other appropriate equitable relief," a paradigmatic example of which is restitution. Section 502(a)(3). Hence, ERISA is most reasonably read as having abrogated the State's Eleventh Amendment immunity from claims seeking equitable, restitutionary relief.

The State objects to this analysis largely on the ground that, because ERISA does not specifically mention "damages," it cannot be held to abrogate the State's Eleventh Amendment immunity from claims for damages. *See* Pet. 15-16. This objection misses the point. Respondents did not seek or receive "damages" in this litigation—that is, relief "measured in terms of a monetary loss resulting from a past breach of a legal duty." *Edelman v. Jordan*, 415 U.S. 651, 668 (1974).

Respondents simply sought a limited form of equitable relief—the return of their own money that had been unlawfully taken under duress by the State. This Court has recognized on more than one occasion that some kinds of monetary awards are not "damages," but instead are basic forms of equitable relief. Thus, the Court has found refunds of rent overpayments, and even lost wages awards, to be authorized by statutes that confer jurisdiction to award only equitable relief. *Porter v. Warner Holding Co.*, 328 U.S. 395 (1946); *Mitchell v. DeMario Jewelry, Inc.*, 361 U.S. 288, 289-293 (1960); *see also Curtis v. Loether*, 415 U.S. 189, 196-197 (1974). "[R]estoring the status quo and ordering the return of that which rightfully belongs to" another is restitution, which "differs greatly" from damages and lies "within the recognized power and within the highest tradition of

a court of equity." *Porter v. Warner Holding Co.*, 328 U.S. at 402. In the same vein, the Court has specifically described tax refunds as a form of equitable relief, in the nature of restitution or unjust enrichment. *Edelman v. Jordan*, 415 U.S. 667, 669 (1974); *Ward v. Board of County Commissioners*, 253 U.S. 17, 24 (1920); *see also* Wolcher, *Sovereign Immunity and the Supremacy Clause: Damages Against States in Their Own Courts for Constitutional Violations*, 69 Calif. L. Rev. 189, 310 (1981).

This Court has held that a congressional abrogation of Eleventh Amendment immunity must be "both unequivocal and textual." *Dellmuth v. Muth*, 491 U.S. 223, 230 (1989). To be sure, ERISA does not contain the words "Eleventh Amendment" or "state sovereign immunity," which would surely meet that standard. But the language used by Congress in ERISA was a reasonable way of achieving the objective of permitting claimants to receive restitution, as well as injunctive relief, in federal court.

Unless this Court insists on a talismanic formula for abrogation—one that could not possibly have been anticipated by Congress when it enacted ERISA in 1974—the language contained in sections 502 and 514 of ERISA is sufficiently unequivocal to require a state to make restitution of unlawfully collected funds. That conclusion is consistent with this Court's Eleventh Amendment holdings. The cases in which the Court has declined to find abrogation have involved broad claims that a state could be sued for damages for violating a federal statute; those claims sharply contrast with the limited abrogation of Eleventh Amendment immunity for restitution claims that is involved here. Where there is no claim that the statute waives state sovereign immunity or generally exposes the state to damages, an inquiry into use of the phrases "Eleventh Amendment," or "state sovereign immunity," or "damages" is misdirected. *Cf. Dellmuth v. Muth*, 491 U.S. at 233 (Scalia, J., concurring). ERISA

specifically provides for suit in federal court against the State to challenge state taxes and to receive "other equitable relief"; that is enough to effect a limited abrogation of Eleventh Amendment immunity for restitutionary relief.[8]

b. In any event, it is unnecessary to reach the ERISA abrogation issue in the peculiar circumstances of this case. As we have explained, the court of appeals concluded that respondents have no refund remedy in state court. Thus, this is not the typical case, where successful invocation of the Eleventh Amendment merely remits a plaintiff to the state courts. In one of its seminal Eleventh Amendment cases, the Court took pains to note that " 'the issue is not the general immunity of the States from private suit . . . but merely the susceptibility of the States to suit before *federal tribunals.*' " *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 240 n.2 (1985) (emphasis in original), quoting *Employees v. Missouri Dept. of Public Health and Welfare*, 411 U.S. 279, 293-294 (1973) (Marshall, J., concurring in result). In this case, however, the issue is not merely whether the state court or the federal court is the proper forum, but whether the State will be excused from paying a refund *anywhere.*

The Eleventh Amendment should not be read to bar a tax refund in federal court if there is no such remedy in state court. This Court has explained on several occasions that the essence of the Eleventh Amendment is the protection of state sovereign immunity. To the extent that the State has the power to preserve its immunity from monetary damages in state court, the Eleventh Amend-

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[8] The payment of pre-judgment interest to make the claimant whole is an element of equitable, restitutionary relief. The State offers no persuasive reason why this Court should review the decision below upholding the award of pre-judgment interest. *See* Pet. 39-42. Indeed, the State acknowledges that "the award of pre-judgment interest is generally discretionary with the trial court." Pet. 40-41. The manner in which the district court exercised that discretion in this case does not warrant this Court's attention.

ment (with limited exceptions) prevents plaintiffs from invoking the federal courts to circumvent that immunity. *See, e.g., Blatchford v. Native Village of Noatak*, 111 S. Ct. 2578, 2581 (1991); *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 31 (1989) (opinion of Scalia, J.).

But here the State is not free to insist, even in its own courts, on a rule of sovereign immunity under which it collects taxes under duress and provides no mechanism for refunding them. That position runs afoul of the Fourteenth Amendment. *McKesson Corp. v. Division of Alcoholic Beverages & Tobacco*, 110 S. Ct. 2238, 2247-2250 (1990); *Carpenter v. Shaw*, 280 U.S. 363, 369 (1930). If the State cannot maintain such immunity in its own courts, it necessarily follows that the Eleventh Amendment was not intended to grant it that immunity in the federal courts. At the very least, any claim to such immunity under the Eleventh Amendment was overridden by the adoption of the Fourteenth Amendment, which made unconstitutional a system that provides no opportunity to obtain a tax refund. *Cf. Pennsylvania v. Union Gas Co.*, 491 U.S. at 41-42 (opinion of Scalia, J.); *Fitzpatrick v. Bitzer*, 427 U.S. 445, 456 (1976). In sum, the result reached by the Court below does not conflict with this Court's holdings in Eleventh Amendment cases.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

MARK L. EVANS
Counsel of Record
ALAN I. HOROWITZ
MILLER & CHEVALIER, Chartered
655 Fifteenth Street, N.W.
Washington, D.C. 20005
(202) 626-5800
Counsel for Respondents

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APPENDICES

APPENDIX A

The Texas Administrative Services Tax Act, Tex. Ins. Code Art. 4.11A (Vernon Supp. 1987-1988), provides in pertinent part:

Art. 4.11A. Administrative Services Tax

Tax payment requirement

Sec. 1 Each insurance carrier receiving any form of administrative or service fee, consideration, payment, premium, fund, reimbursement, or compensation for performing or providing any service, function, or duty, or acting in any administrative, clerical, management, advisory, or technical capacity, or providing any claims or expense review, service, administration, management, payment, indemnification, or reimbursement, under an administrative service contract to be performed in this state, or on behalf of persons in this state, or for risks located in this state, and relating to any employer-employee, multiple employer-employee, self-insurance group, member, or other medical, accident, sickness, injury, indemnity, death, or health benefit plan, including but not limited to any medical, surgical, orthopedic, chiropractic, physical therapy, speech pathology, audiology, mental health, dental, hospital, workers' compensation, optometric, or health maintenance organization plan or program, but excluding any portion of such plan for which premiums for insurance are received by the carrier and are otherwise subject to taxation by this state under Article 1.14-1, 1.14-2, 4.10, or 4.11, Insurance Code, or Section 33, Texas Health Maintenance Organization Act (Article 20A.33, Vernon's Texas Insurance Code), shall pay to the State Board of Insurance as provided by this article for transmittal to the state treasurer an annual tax on the gross amount of administrative or service fees received by the carrier. This section does not apply to a person to the extent he receives an administrative or service fee, consideration, payment, premium, fund, reimbursement, or compensation, as provided

by this section, from a unit or units of local government, or from units of local government that have organized under The Interlocal Cooperation Act (Article 4413(32c), Vernon's Texas Civil Statutes) or Article 4413(32i), Revised Statutes, to provide group workers' compensation, health, accident, dental, disability, and life insurance solely to local government employees. This section does not apply to local mutual aid associations or fraternal benefit societies or associations.

Other tax payment requirement

Sec. 2. Each person, except an insurance carrier subject to Section 1 of this article, receiving any form of administrative or service fee, consideration, payment, premium, fund, reimbursement, or compensation for performing or providing any service, function, or duty, or acting in any administrative, clerical, management, advisory, or technical capacity, or providing any claims or expense review, service, administration, management, payment, indemnification, or reimbursement, under an administrative service contract to be performed in this state, or on behalf of persons in this state, or for risks located in this state, and relating to any employer-employee, multiple employer-employee, self-insurance group, member, or other medical, accident, sickness, injury, indemnity, death, or health benefit plan, including but not limited to any medical, surgical, orthopedic, chiropractic, physical therapy, speech pathology, audiology, mental health, dental, hospital, workers' compensation, optometric, or health maintenance organization plan or program, but excluding any portion of such plan for which premiums for insurance are received by an insurance carrier and are otherwise subject to taxation by this state under Article 1.14-1, 1.14-2, 4.10, or 4.11, Insurance Code, or Section 33, Texas Health Maintenance Organization Act (Article 20A.33, Vernon's Texas Insurance Code), shall pay to the State Board of Insurance as provided by this article for transmittal to the state treasurer an annual tax on the gross amount of

administrative or service fees received by the person. This section does not apply to a person to the extent he receives an administrative or service fee, consideration, payment, premium, fund, reimbursement, or compensation, as provided by this section, from a unit or units of local government, or from units of local government that have organized under The Interlocal Cooperation Act (Article 4413(32c), Vernon's Texas Civil Statutes) or Article 4413(32i), Revised Statutes, to provide group workers' compensation, health, accident, dental, disability, and life insurance solely to local government employees. This section does not apply to local mutual aid associations or to fraternal benefit societies or associations.

Definitions

Sec. 3. In this article:

(1) "Insurance carrier" or "carrier" means:

(A) every type of foreign and domestic insurer engaged in the business of insurance;

(B) every insurer that is licensed or operates under, or is required to be licensed or to operate under, Chapter 2, 3, 8, 11, 13, 14, 15, 16, 17, 18, 19, 20, or 22, Insurance Code, or Article 1.14-2, Insurance Code.

(C) a health maintenance organization that is licensed or operates under the Texas Health Maintenance Organization Act (Chapter 20A, Vernon's Texas Insurance Code); and

(D) an unauthorized insurer within the meaning of Article 1.14-1, Insurance Code.

(2) "Gross amount of administrative or service fee" includes:

(A) the total gross amount of all consideration, fees, payments, reimbursements, and all compensation received by the carrier or other person during the taxable year for

each and every kind of such service, activity, or function described either in Section 1 or Section 2 of this article; and

(B) the total amount of all claims and benefits paid to or on behalf of employers, multiple employers, employees, unions, beneficiaries, trusts, members, spouses, dependents, or other persons under a plan described in either Section 1 or Section 2 of this article.

(3) "Taxable year" is the calendar year, January 1 through December 31.

(4) "Person" includes an individual, corporation, organization, government or governmental subdivision or agency, business trust, estate, trust, partnership, association, plan, or any other legal entity.

(5) "Administrative service contract" means a management contract, agency contract, or other written or oral contract or agreement under which the management, administration, or servicing of a plan or any portion of a plan, is provided by an insurance carrier or other person.

(6) "Plan" means any plan, fund, trust, or other program to the extent that the plan, fund, trust, or program is established or maintained for the purpose of providing persons, including spouses and beneficiaries, through insurance or otherwise, the benefits or coverage specified in Section 1 or Section 2 of this article.

Tax rate

Sec. 4. (a) There is imposed on each insurance carrier subject to Section 1 of this article and on each person subject to Section 2 of this article an annual tax equal to 2.5 percent of the gross amount of administrative or service fees respecting that carrier or person, but that insurance carrier or person is not liable for the payment of the gross amount of administrative or service fees as defined

in Section 3(2)(B) of this article to the extent that funds from which the insurance carrier or person is able to collect or retain that tax as provided by Subsection (c) of this section do not come into the possession or under the control of the carrier or person, or to the extent collection or retention is preempted by federal law. An insurance carrier subject to Section 1 of this article and a person subject to Section 2 of this article may not, on or after the effective date of this article, enter into any administrative service contract with any plan that does not provide for the retention or collection by the insurance carrier or person of the tax imposed on and required to be paid to the State Board of Insurance under this article.

(b) An insurance carrier subject to Section 1 of this article or a person subject to Section 2 of this article shall remit any tax owed under this section as specified in Subsection (a) of this section on behalf of itself and the plan or person for whom the service, administration, activity, management, or similar function is performed, and for that purpose is authorized and directed to collect or retain the amount of tax imposed by this article from funds, assessments, dues, premiums, or other money coming into its hands or under its control.

(c) Except to the extent preempted by federal law, there is imposed on each plan of the type described in Section 1 or 2 of this article an annual tax equal to 2.5 percent of the gross amount of administrative or service fees and that plan shall pay the tax to the State Board of Insurance for transmittal to the state treasurer. The tax provided by this subsection is imposed and is owed only to the extent a tax is not paid under Subsection (a) of this section.

(d) Notwithstanding any other provision of this article, the tax imposed under this article creates no duty and shall not be collected to the extent preempted or prohibited under the constitution of this state or the United States.

It is the intent of the legislature that this article not apply to any person, risk, or transaction to which it may not lawfully apply under the constitution of this state or the United States.

APPENDIX B

IN THE DISTRICT COURT OF
TRAVIS COUNTY, TEXAS
331ST JUDICIAL DISTRICT

No. 443,704

E-SYSTEMS, INC. GROUP HOSPITAL MEDICAL AND SURGICAL INSURANCE PLAN, *et al.*,
Plaintiffs,

vs.

DOYCE R. LEE, Commissioner of the Texas State Board of Insurance, *et al.*,
Defendants.

ORDER

The Application of Plaintiffs in this cause for a temporary injunction came on regularly for hearing this day, due notice having been given. The parties appeared in person and by their attorneys. On considering the evidence received and the argument of counsel, the Court finds and concludes that Plaintiffs will probably prevail on the trial of this cause; that Doyce R. Lee, Commissioner of the Texas State Board of Insurance (the "Board"), Edwin J. Smith, Jr., Member and Chairman of the Board, David H. Thornberry, Member of the Board, James L. Nelson, Member of the Board (said Chairman and Members sometimes referred to herein collectively as the "Board"), Ann Richards, Treasurer of the State of Texas (the "Treasurer"), and Jim Mattox, Attorney General of the State of Texas (the "Attorney General") Defendants herein, intend to collect and allocate immediately for expenditure the taxes imposed under Article 4.11A and assess any available statutory penalties as soon as possible

and before the Court can render judgment in this cause; that if Defendants carry out these intentions, they will thereby alter the status quo and tend to make ineffectual a judgment in favor of Plaintiffs, in that (1) Defendants refuse to recognize Plaintiffs' standing to protest and obtain a refund as taxpayers and (2) the taxes paid under Article 4.11A are not subject to a statutory refund procedure or any legislative appropriation for refund judgments and that unless Defendants are deterred from carrying out these intentions, Plaintiffs will be without any adequate remedy at law in that Plaintiffs will be without means to recover the taxes paid pursuant to Article 4.11A.

IT IS THEREFORE ORDERED that:

(a) Doyce R. Lee, Commissioner of the Texas State Board of Insurance;

(b) Edwin J. Smith, Jr., Chairman and Member of the Texas State Board of Insurance;

(c) David H. Thornberry, Member of the Texas State Board of Insurance;

(d) James L. Nelson, Member of the Texas State Board of Insurance;

(e) Ann Richards, Member of the Texas State Board of Insurance; and

(f) Jim Mattox, Attorney General of the State of Texas,

Defendants herein, be, and hereby are, commanded forthwith to desist and refrain from enforcing against Plaintiffs Article 4.11A of the Texas Insurance Code and the Emergency Rules adopted by the State Board of Insurance in conjunction therewith and Defendants are further enjoined from attempting against Plaintiffs any collection of said tax or imposing any penalties in connection therewith.

Plaintiffs are ordered either to tender the principal amount of each Plaintiff's tax payment into the registry of this Court as, if, and when due under Article 4.11A

or to post good and sufficient surety bond in the principal amount of each Plaintiff's tax payment as, if, and when due under Article 4.11A, conditioned that Plaintiffs will abide by the decision which may be made in this cause and that they will pay all sums of money and costs that may be adjudged against them if the temporary injunction shall be dissolved in whole or in part.

IT IS FURTHER ORDERED that all monies paid into the Registry of the Court in this cause by the Plaintiffs shall be invested in a fully federally insured interest bearing account pending any future orders of this Court.

The clerk shall forthwith issue a temporary injunction in conformity with the law and the terms of this order.

IT IS FURTHER ORDERED that trial on the merits of this cause is ordered set for the 13th day of February, 1989.

SIGNED this 26th day of September, 1988.

/s/ Pete Lowry
Judge Presiding

APPENDIX C

RULE 29.1 STATEMENT

The following companies hold a direct or indirect ownership interest in US Sprint Communications Company:

UCOM, Inc.
GTE Communications Services Incorporated
United Telecommunications, Inc.
US Telecom, Inc.
GTE Corporation

US Sprint has the following subsidiaries that are not wholly owned:

Plessey-Telenet Limited
Sprint Networks USSR
ACE Telemail International, Inc. (Japan)

Kimberly-Clark Corporation has the following subsidiaries that are not wholly owned:

Carlton Paper Corporation Limited
Colombiana Kimberly S.A.
Colombiana Universal de Papeles S.A.
Comercial Papelera S. de R.L.
Distribuidora de Manufacturas Centro Americanas, S.A.
Hermex, A.P.
K.C.S.A. Holdings (Proprietary) Limited
Kimberly-Clark Australia Pty. Limited
Kimberly-Clark de Centro America S.A.
Kimberly-Clark Costa Rica, S.A.
Kimberly-Clark Far East Pte. Limited
Kimberly-Clark Malaysia
Kimberly-Clark de Mexico, S.A. de C.V.
Kimberly-Clark Philippines Inc.
Kimberly-Clark Thailand Limited
LTR Industries S.A.
Neenah & Menasha Water Power Co.

P.T. Kimsari Paper Indonesia
Spruce Falls Power and Paper Company Limited
YuHan-Kimberly, Limited

Shell Oil Company is owned by Shell Petroleum Inc., which is owned in turn 60% by Royal Dutch Petroleum Company and 40% by The Shell Transport and Trading Company, p.l.c.

Shell Oil Company has the following subsidiaries that are not wholly owned:

Fractionation Research, Inc.
GRAVPAC, Inc.
Heat Transfer Research, Inc.
Inland Corporation
Loop, Inc.
Lucky Chance Mining Company, Inc.
Mesbic Financial Corporation of Houston
Agripo Bioscience Inc.
Oil Companies Institute for Marine Pollution Comp
Oil Insurance Limited
Pecten Middle Eastern Services Company
Saudi Petrochemical Company
CRI International, Inc.
CRI Far East Trading Company Limited
CRI Europe S.A.
Catalyst Recovery Europe S.A.
Catalyst Technology Europe S.A.
CRI-SAM, Ltd.
CRI Ventures, Inc.
Catalyst Technology S.A.R.L.
Nippon CRI, LTD.
Criterion Catalyst Company
Pecten Portugal Company S.A.R.L.
Pecten Cameroon Company
Pecten Portugal Company S.A.R.L. Al Furat Petroleum Company
Taranaki Offshore Petroleum Company Limited

Columbia LNG Corporation
East Texas Salt Water Disposal Company
Grande Ecaille Land Company, Inc.
Cortez Capital Corporation
Van Salt Water Disposal Company
Wyoming Industrial Development Corporation
Butte Pipe Line Company
Dixie Pipeline Company
Explorer Pipeline Company
Locap, Inc.
Olympic Pipe Line Company
Plantation Pipe Line Company
West Shore Pipe Line Company
Wolverine Pipe Line Company
Premix/E.M.S. Inc.
United Scientific Incorporation

Greyhound Lines, Inc. has the following subsidiaries that are not wholly owned:

Amarillo Trailways Bus Center, Inc.
Continental Panhandle Lines, Inc.
GK Contract Services, Inc.
Greyhound Charter Service, Inc.
Greyhound de Mexico S.A. De, C.V.
Union Bus Station, of Oklahoma City, Oklahoma
Wilmington Union Bus Station Corporation

La Quinta Motor Inns, Inc. has the following subsidiary that is not wholly owned:

Beverage Services, Inc.

The Pillsbury Company is a wholly owned indirect subsidiary of Grand Metropolitan PLC.

NO. 91-428

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1991

PHILIP W. BARNES, COMMISSIONER OF TEXAS STATE BOARD OF INSURANCE, *et al.*
Petitioners,

v.

E-SYSTEMS, INC. GROUP HOSPITAL MEDICAL & SURGICAL INSURANCE PLAN, *et al.*
Respondents

REPLY BRIEF TO BRIEF FOR RESPONDENTS IN OPPOSITION

DAN MORALES
Attorney General of Texas

WILL PRYOR
First Assistant Attorney General

MARY F. KELLER
Deputy Attorney General

HARRIET D. BURKE
Assistant Attorney General

DAVID D. MENCHACA
Assistant Attorney General

Of Counsel

*WILLIAM E. STORIE
Assistant Attorney General
Office of the Attorney General
P. O. Box 12548
Austin, TX 78711-2548
(512) 463-2002

**Counsel of Record*

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REPLY BRIEF TO BRIEF FOR RESPONDENTS IN OPPOSITION

Pursuant to Sup. Ct. R. 15.6, Petitioners respectfully file this Reply Brief to Respondents' Brief In Opposition.

1. A refund of taxes from the State Treasury under the rubric of "equitable restitution" is barred by the Eleventh Amendment in the absence of consent or abrogation of sovereign immunity regardless of the existence of any other remedy.

Respondents attempt to rewrite this Court's test of Eleventh Amendment abrogation since they know they cannot meet it. While claiming boldly that ERISA expressly abrogates the state's Eleventh Amendment immunity, Respondents point to no unequivocal statutory language providing that states or state agencies may be sued under ERISA; and there is none. Cf. ***Pennsylvania v. Union Gas Co.***, 491 U.S. 1 (1989). To "contemplate subjecting the states to suits in federal court" as "logical defendant[s]" is not enough. ***Dellmuth v. Muth***, 491 U.S. 223 (1989).

The Court has already determined that a refund of taxes from the State Treasury is barred by the Eleventh Amendment in the absence of consent to suit by the State. ***Ford Motor Co. v. Department of Treasury***, 323 U.S. 459 (1945). The Court has held specifically that merely styling a monetary award from the State Treasury as "equitable restitution" does not avoid the bar of the Eleventh Amendment. ***Edelman v. Jordan,*** 415 U.S. 651 (1974). "The term 'equitable restitution' would seem even more applicable to the relief

sought in that case, since the taxpayer had at one time had the money, and paid it over to the state pursuant to an allegedly unconstitutional tax exaction. Yet this Court had no hesitation in holding that the taxpayer's action was a suit against the state and barred by the Eleventh Amendment." ***Id.***, at 669. (***citing Ford***).

Additionally, Respondents suggest that the Court of Appeals' decision will have "only limited legal significance" because it "offers no supporting discussion." Res. Br., p. 21. One may well wonder how an issue of the Court's subject matter jurisdiction involving principles of federalism and the Constitution of the United States can simply disappear between the lines.[1] A decision which requires monetary relief from the State Treasury under a federal statute which has millions of potential plaintiffs can hardly have "limited legal significance".

A holding that the Eleventh Amendment does not apply if there is no state remedy would also be in sharp conflict with decisions in at least four other Circuits. ***See*** Pet. at p. 17 and authorities cited. In any event, the State has

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[1] "The State appeals, contending that the federal court lacked jurisdiction by virtue of the Tax Injunction Act, 28 U.S.C. §1341, and the eleventh amendment ... ." Pet. App., p. 2a. "Having concluded that ASTA is preempted by ERISA we need proceed no further." Pet. App., p.11a.

consistently maintained that its tax protest remedy is available and should be employed by Respondents to seek a refund of the ASTA taxes.[2]

2. The proper application of the Tax Injunction Act has nothing to do with the merits of any particular tax.

A court should not consider the merits of a case in order to determine its subject matter jurisdiction. Congress did not enact the Tax Injunction Act to keep state tax disputes out of federal court only when the state will clearly win on the merits. Issues of the Constitution, the principles of federalism and the intent of Congress in the Tax Injunction Act have significance far beyond the scope of this (or any) particular dispute. Respondents suggest that the "Court should not exercise its certiorari jurisdiction to resolve procedural questions that will not affect the ultimate outcome of the case". Res. Br., p. 8. Under this results driven theory, the Court could tolerate a criminal

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[2]If the State were more interested in money than in the integrity of its tax system, it could argue that the Eleventh Amendment bars any monetary award and *agree* that Respondents may bring their claim only under ERISA. The State does not and will not make this argument because the principles of constitutional federalism at issue in this case, which apply with special force to state tax administration, are far more important than any short term financial gain.

confession obtained by torture if the Court were reasonably sure that the Defendant was guilty.

In suggesting that the current dispute is only between the State and ERISA plans, Respondents also conveniently forget the scope of relief ordered by the district court. "IT IS FURTHER ORDERED that Defendant and his agents are enjoined from seeking, directly or indirectly, to collect from any of the Plaintiffs herein, any of the Plaintiffs' sponsoring employers, employee participants or their administrative service providers, the tax or any portion thereof imposed by Article 4.11A ... ." Pet. App., 53a - 54a. Thus, the State can not simply give the plans their money and file collection suits against the sponsoring employers or administrative service providers.

The State has not "changed its tune and essentially abandoned its defense of the statute on the merits *as applied to these plans*." Res. Br., p. 7. The State never wanted payment of the tax from the plans and trusts and has had some obvious difficulties because of their decision to pay a tax they did not owe.[3] At the same time

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[3]Respondents suggest that *they* "have been taken on a tour of the federal and state court systems". Res. Br., p. 14. Respondents acknowledge the State's construction of ASTA "that the employers, not the plans, were the taxpayers," and that "the State has argued that ERISA plans are not ASTA

the State does not concede that Respondents should get a refund of ASTA taxes paid by them. Under this theory any "taxpayer" could disrupt state tax administration and avoid the procedural protections which this Court has unanimously approved merely by having someone else pay its taxes. ***See McKesson Corp. v. Division Alcoholic Beverages and Tobacco, Dep't of Business Regulation***, 110 S.Ct. 2238 (1990).

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taxpayers." Res. Br., pp. 3, 13. Some Respondents, however, even changed the ASTA tax return forms in order to pay the tax from plan assets. Copies of portions of the exhibits to ***E-Systems'*** petitions in state court are being lodged with the Clerk for the convenience of the Court, along with the state court TRO and preliminary injunction orders and additional pages from the transcript of the state court hearing on the preliminary injunction. One of the Plaintiffs' witnesses at the September 12, 1988, injunction hearing testified that the ASTA tax was paid from plan assets "on advice of counsel" without contacting the State Board of Insurance. Hrg. Trans., pp. 110-111. Another testified that the decision to pay the tax from plan assets was made by the "main fiduciary of the plan". ***Id.***, p. 95. Respondents' claims of ERISA preemption are logically irreconcilable with their actions in paying a tax which does not apply "to the extent preempted by federal law" and which was never demanded from them. ASTA §4(c). Respondents, not Petitioners, questioned their standing in state court and the State's ability to provide a tax refund, and filed a federal suit after actually obtaining state injunctive relief. Respondents also do not say how Petitioners can make "equitable restitution" of taxes which were deposited into the registry of the state district court pursuant to their request. At this point it does not matter what was the basis for Respondents' actions. Nothing should distract the Court from the critical issues of federal jurisdiction and constitutional federalism which require this Court's decision.

3. To avoid the Tax Injunction Act, Respondents rely on an argument not relied on by the Court of Appeals.

In the judgment of the Court of Appeals, only ERISA's "preemption factor" prevented dismissal of Respondents' case under the Tax Injunction Act. No detailed examination of state tax law is necessary to resolve this case. Respondents claim that the *State* court ruled that they had no "plain, speedy and efficient remedy" Res. Br., p. 9. By granting a preliminary injunction, the State district court did not conclude that it could provide no remedy. The equitable power of Texas state courts is just as thorough as that of the federal district court.

When it comes to state tax remedies in Texas, Respondents have an embarrassment of riches. Respondents already had obtained a TRO and a preliminary injunction from state district court at the time they filed their federal suit. Indeed, under the Texas Tax Code, Respondents could have sought an injunction before anyone was required to pay the tax. TEX. TAX CODE ANN. §112.101, ***et seq.*** (West 1982). As taxes came due Respondents could have posted a bond or paid the tax into the suspense account where it would remain pending the outcome of the proceedings. The State also has never disputed that its tax protest remedy is available to Respondents as

the persons who paid the tax and filed the written protest. ***Bernard Hanyard Enterprises, Inc. v. McBeath***, 663 S.W.2d 639 (Tex. App. - Austin 1983, writ ref'd n.r.e.). Similarly, the refund provision in the protest statutes must be interpreted to actually provide a refund because of both the clear legislative intent and the constitutional requirement to do so. ***Id.; McKesson, supra.***; TEX. TAX CODE ANN. §112.060 (West 1982).

It is very important that this Court discuss the parameters of ERISA jurisdiction where states or state agencies are defendants, especially concerning state insurance regulation or taxation.[4] Only by clarifying ERISA jurisdiction as applied to suits against a state or state agency can the fifty states and the millions of persons affected by ERISA know

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[4]Respondents cite nothing in ERISA's history to show how their claim is similar to the Plaintiff in ***Taylor. Metropolitan Life Ins. Co. v. Taylor***, 481 U.S. 58 (1987). In fact the report cited in ***Taylor*** says nothing about a congressional intent to eliminate state tax claims based on ERISA preemption, but is solely concerned with actions "to recover benefits due under the plan, to clarify rights to receive future benefits under the plan and for relief from breach of fiduciary responsibility." H.R. CONF. REP. No. 1280, 93rd Cong., 2nd Sess., *reprinted in* 1974 U.S. CODE CONG. & ADMIN. NEWS 5038, 5106. "The intent of the Committee is to provide the full range of legal and equitable remedies available in both state and federal courts ... ." H.R. REP. No. 533, 93rd Cong., 2nd Sess., *reprinted in* 1974 U. S. CODE CONG. & ADMIN. NEWS 4639, 4655.

where complaints can be brought and what relief may be obtained. This question, which was expressly left open as to tax claims by ERISA entities, needs to be answered. ***Franchise Tax Board v. Construction Laborers' Vacation Trust,*** 463 U.S. 1 (1983).

4. If, and only if, the Court determines that it has jurisdiction over this State tax dispute, the Court should consider whether ASTA is valid.

ASTA has not been repealed. The State contends, as it did in the courts below, that ASTA is valid under ERISA's insurance savings clause. 29 U.S.C.A. §1144(b)(2) (West 1955). ***Birdsong v. Olson***, 708 F.Supp. 792, 799-801 (W.D. Tex. 1989) ***appeal dismissed, sub. nom., Birdsong v. Wrotenbery***, 901 F.2d 1270 (5th Cir. 1990). ***See also E-Systems,*** Pet. App., p. 10a and Suggestion for Rehearing En Banc attached to Petitioners' Motion to Stay filed with Justice Scalia, Issue No. 3 and discussion pp. 12-14.

Excerpts from the preliminary injunction hearing, lodged with the Court, illustrate how the claims process works and the role of insurance companies and third party

administrators in that process.[5] The State should be allowed to exercise its traditional and specially recognized powers of regulation and taxation over persons in the insurance business since these powers are not limited by the deemer clause. 29 U.S.C.A. §1144(b)(2)(B) (West 1985); 15 U.S.C.A. §1011, *et seq.* (West 1976); ***Western & Southern Life Ins. Co. v. State Board of Equalization***, 451 U.S. 648 (1981). The federal injunction, issued to the plans, wrongfully blocks the State authority expressly preserved in ERISA.

In the interests of constitutional federalism and of justice this Court should grant the writ.

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[5]Federal ERISA regulations clearly anticipate rather than reject continuing State regulatory authority where ERISA benefits "are provided or administered by an insurance company, insurance service, or other similar organization." 29 C.F.R. §2560.503-1(c)(1), (g)(2) (1991).

Respectfully submitted,

DAN MORALES
Attorney General of Texas

WILL PRYOR
First Assistant Attorney General

MARY F. KELLER
Deputy Attorney General

HARRIET D. BURKE
Assistant Attorney General
Chief, Taxation Division

DAVID D. MENCHACA
Assistant Attorney General

*WILLIAM E. STORIE
Assistant Attorney General
Taxation Division
P. O. Box 12548
Austin, Texas 78711-2548
(512) 463-2002
(512) 478-4013 Telecopier
**Counsel of Record*